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IN THE

Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,

Petitioners,

v.

SHELL PETROLEUM N.V., SUCCESSOR TO ROYAL DUTCH PETROLEUM COMPANY, AND THE SHELL TRANSPORT AND TRADING COMPANY, LTD., FORMERLY KNOWN AS THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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August 12, 2011

QUESTIONS PRESENTED

1. Whether corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is an issue of subject matter jurisdiction.

2. Whether the court of appeals properly dismissed Petitioners' law-of-nations claims against Respondents, foreign holding corporations whose foreign subsidiary allegedly aided and abetted acts in Nigeria by the Nigerian government against its own citizens.

PARTIES TO THE PROCEEDINGS

Petitioners are Esther Kiobel, individually and on behalf of her late husband, Dr. Barinem Kiobel, Bishop Augustine Numene John-Miller, Charles Baridorn Wiwa, Israel Pyakene Nwidor, Kendricks Dorle Nwikpo, Anthony B. Kote-Witah, Victor B. Wifa, Dumle J. Kunenu, Benson Magnus Ikari, Legbara Tony Idigima, Pius Nwinee, and Kpobari Tusima, individually and on behalf of his late father, Clement Tusima.

Respondents are Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, and the Shell Transport and Trading Company, Ltd., formerly known as The "Shell" Transport and Trading Company, p.l.c. Shell Petroleum Development Company of Nigeria, Ltd., was a defendant in the district court, but was not a party to the proceedings before the court of appeals and is not a respondent here.*

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondent Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, is a wholly owned subsidiary of Royal Dutch Shell, p.l.c.

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* The caption on Kiobel's petition for certiorari incorrectly lists Shell Petroleum Development Company of Nigeria, Ltd. as a respondent.

Respondent the Shell Transport and Trading Company, Ltd., formerly known as The "Shell" Transport and Trading Company, p.l.c., is a wholly owned subsidiary of Respondent Shell Petroleum N.V., except for one share that is held by a dividend access trust for the benefit of one class of ordinary shares of Royal Dutch Shell, p.l.c.

Royal Dutch Shell, p.l.c. is a publicly traded company. No publicly traded company has a 10% or greater stock ownership in Royal Dutch Shell, p.l.c.

TABLE OF CONTENTS

TABLE OF AUTHORITIES viii

STATEMENT OF THE CASE 1

A. Factual Background 3

B. Proceedings Below 4

1. The District Court's Decision 4

2. The Appeal 5

3. The Second Circuit's Decision 7

4. The Petitions for Rehearing 8

REASONS FOR DENYING THE PETITION 9

I. CERTIORARI IS UNWARRANTED TO DECIDE WHETHER DISMISSAL SHOULD HAVE BEEN UNDER RULE 12(B)(1) OR 12(B)(6). 9

A. The Second Circuit's Decision Does Not Conflict with Any Decision of This Court. 10

B. The Second Circuit's Decision Does Not Conflict with the Decisions of Any Other Court of Appeals. 13

C. Whether Corporate Liability Is an Issue of Subject Matter Jurisdiction Is Irrelevant to the Outcome of the Case. 15

Page

II. CERTIORARI IS UNWARRANTED TO DECIDE WHETHER THE ATS PROVIDES JURISDICTION OVER CORPORATIONS. 16

A. The Second Circuit's Decision Is a Straightforward Application of *Sosa*. 17

1. The Second Circuit's Decision Does Not Conflict with the Language, History, or Purpose of the ATS..... 18

2. The Second Circuit's Decision Does Not Conflict with *Sosa* Footnote Twenty. 22

3. The Second Circuit's Decision Does Not Conflict with *Sosa*'s View of the Role of Federal Common Law. 23

4. The Second Circuit's Decision Did Not Improperly Ignore General Principles of Law Common to Legal Systems..... 27

B. The Second Circuit's Decision Is Not as Far-Reaching as Kiobel Suggests. 29

C. This Case Presents a Poor Vehicle Through Which to Address Corporate Liability Under the ATS..... 30

D. Review of the Issue of Corporate Liability Under the ATS Is Premature..... 35

Page

CONCLUSION 36

APPENDIX

Order Denying Motion to Recall the Mandate, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. Mar. 1, 2011) 1a

Declaration of Babatunde Aribido, *Wiwa, et al., v. Shell Petroleum Dev. Co. of Nigeria Ltd.*, No. 04 Civ. 2665, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, No. 02 Civ. 7618 (S.D.N.Y. Feb. 1, 2007) 3a

Declaration of Robbert van der Vlist, *Wiwa, et al., v. Royal Dutch Petroleum Co., et al.*, No. 96 Civ. 8386 (S.D.N.Y. Mar. 28, 1997), ECF No. 3 ..... 8a

Declaration of Jyoti Munsiff, *Wiwa, et al., v. Royal Dutch Petroleum Co., et al.*, No. 96 Civ. 8386 (S.D.N.Y. Mar. 28, 1997), ECF No. 3 ..... 13a

Brief of Appellees/Cross-Appellants, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. June 6, 2007) 17a

Page

Reply Brief for Plaintiffs-Appellants-Cross-Appellees, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. July 6, 2007) 83a

Reply Brief of Appellees/Cross-Appellants, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, Nos. 06-4800-cv, 06-4876-cv (2d Cir. July 24, 2007) 152a

Letter from Carey R. D'Avino to the Court, *Presbyterian Church of Sudan, et al. v. Talisman Energy Inc., et al.*, No. 07-0016-cv (2d Cir. Jan. 23, 2009) 190a

TABLE OF AUTHORITIES

Page(s)

Cases

Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005) 35

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 11, 12

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 19

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 8

Aziz v. Alcolac, Inc., No. 10-1908 (4th Cir.) 35

Bolchos v. Darrel, 3 F. Cas. 810 (No. 1,607) (D. S.C. 1795) 19

Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010) 26, 34

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 25

Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 24

Doe v. Exxon Mobil Corp., Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011) 3, 10, 31, 35

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2009) 20

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 24, 28

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba,
462 U.S. 611 (1983) 28, 29

Flomo v. Firestone Natural Rubber Co.,
643 F.3d 1013 (7th Cir. 2011) 3, 10, 35

Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.,
545 U.S. 308 (2005) 13

Herero People's Reparations Corp. v. Deutsche Bank, A.G.,
370 F.3d 1192 (D.C. Cir. 2004) 14

IIT v. Vencap, Ltd., 519 F.2d 1001
(2d Cir. 1975) 28

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) 22

Licea v. Curacao Drydock Co.,
584 F. Supp. 2d 1355 (S.D. Fla. 2008) 30

Liu Bo Shan v. China Constr. Bank Corp., No. 10-2992-cv, 2011 WL
1681995 (2d Cir. May 5, 2011) 30

Mohamad v. Rajoub,
634 F.3d 604 (D.C. Cir. 2011) 26, 34

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 35

Morrison v. Nat'l Australia Bank, 130 S. Ct. 2869 (2010) 11, 12

Moxon v. The Fanny, 17 F. Cas. 942 (No. 9,895) (D. Pa. 1793) 20

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) 7, 8

Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) 11, 12

Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008) 2, 14, 35

Sarei v. Rio Tinto, Nos. 02-56256, 02-56390 (9th Cir.) 35

Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) 35

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ..... passim

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 11, 12

Swint v. Chambers County Comm'n, 514 U.S. 35 (1995) 16

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) 22

United States v. Stanley,
483 U.S. 669 (1987) 16

Webster v. Fall,
266 U.S. 507 (1925) 14

Whitney v. Robertson,
124 U.S. 190 (1888) 33

Yamaha Motor Corp., U.S.A. v. Calhoun,
516 U.S. 199 (1996) 15

Statutes & Rules

15 U.S.C. § 78aa 12

15 U.S.C. § 78j(b) 12

17 U.S.C. § 501(a) 12

28 U.S.C. § 1292(b) 5, 15, 16

28 U.S.C. § 1331 ..... 10, 12, 13

28 U.S.C. § 1338 12

28 U.S.C. § 1350 (Alien Tort Statute) ..... passim

28 U.S.C. § 1350 note
(Torture Victim Protection Act) 24, 26, 34

42 U.S.C. § 2000e-5(f)(3) 12

42 U.S.C. § 11046 12

Other Authorities

1 Op. Att'y Gen. 57 19

Audio Recording of Oral Argument, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, Nos. 06-480-cv 06-4876-cv (2d Cir. Jan. 12, 2009) 7

CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (Comm. Print 2001) 33

Control Council Proclamation No. 1 27

JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN (1978) 27

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) 28

United States Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 8068 (1992) 33

United States Senate Resolution of Ratification, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486 (daily ed., Oct. 27, 1990) 33

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The decision below does not "assert[] a radical overhaul of all existing ATS jurisprudence". (Petition for Writ of Certiorari ("the Petition" or "Pet.") 10.) The Second Circuit's determination that (1) the issue of corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is one of subject matter jurisdiction, and (2) claims against corporations fall outside the jurisdiction provided by the ATS, represents a straightforward application of this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Sosa made three propositions clear. *First*, "the [ATS] is in terms only jurisdictional". *Sosa*, 542 U.S. at 712; *see id.* at 729. *Second*, *Sosa* does not support Petitioners' argument that the ATS was enacted to provide "broad remedies" (Pet. 25, 30); rather, *Sosa* instructs that courts should exercise great caution "when considering the kinds of individual claims that might implement the jurisdiction of the" ATS. *Sosa*, 542 U.S. at 725. *Third*, as part of the determination of whether a norm of international law supports a cause of action, courts must consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued". *Id.* at 732 & n.20.

Petitioners allege that Shell Petroleum N.V. and the Shell Transport and Trading Company, Ltd., through their subsidiary Shell Petroleum Development Company of Nigeria, Ltd., aided and abetted the Nigerian government's violations of

human rights. Faithfully adhering to *Sosa*'s instructions, the Second Circuit considered whether the law of nations provides jurisdiction over those claims. Examining the present state of international law, the court found "a jurisprudence, first set forth in Nuremberg, and repeated by every international tribunal of which [it was] aware, that offenses against the law of nations . . . for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations." (Appendix to the Petition ("Pet. App.") A-15.) Following *Sosa*'s admonition to exercise caution, the Second Circuit concluded that the ATS "simply does not confer jurisdiction over suits against corporations". (*Id.* at A-16-17.) It therefore dismissed Petitioners' complaint for lack of subject matter jurisdiction. (*Id.* at A-81.)

The Second Circuit's determination that corporate liability under the ATS is an issue of subject matter jurisdiction does not "conflict[] with virtually every other ATS appellate decision involving a corporate defendant". (Pet. 16-17.) Indeed, the only other court of appeals explicitly to determine whether corporate liability under the ATS is a jurisdictional issue has agreed with the Second Circuit that it is, *see Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), a result compelled by *Sosa* in any event.

Post-petition, a conflict between the Second Circuit and the Seventh and District of Columbia Circuits developed on the question of whether the ATS provides jurisdiction over corporations. *See*

Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011), *petition for reh'g en banc filed* (D.C. Cir. Aug. 8, 2011). However, in addition to the fact that the Second Circuit's decision represents a straightforward application of *Sosa*, review by this Court is unwarranted because: the Second Circuit's decision is not as far-reaching as Petitioners suggest; this case presents a poor vehicle through which to address the question of corporate liability under the ATS; and review now would be premature. Additionally, the panel unanimously agreed that this case should be dismissed, so a grant of a writ of certiorari here would have no effect on the outcome of this case.

A. Factual Background

Respondent Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, and Respondent the Shell Transport and Trading Company, Ltd. ("Shell Transport"), formerly known as The "Shell" Transport and Trading Company p.l.c., (collectively, "Shell") are Dutch and English holding companies, respectively. (Pet. App. A-22 & n.25.) Together they wholly own The Shell Petroleum Company, Ltd., a holding company that, in turn, owns Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC"). (*Id.* at A-170 n.50.) SPDC is a corporation organized under the laws of Nigeria with its corporate headquarters in Nigeria. (App. 4a ¶2.)[1]

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[1] References to "App." are to the appendix attached hereto.

SPDC began operating oil production facilities in the Ogoniland region of Nigeria in 1958. (Pet. App. A-22.) SPDC is separate and distinct from the respondent holding companies, which, as holding companies, do not engage in operational activities in Nigeria or elsewhere. (*See* App. 9a ¶ 3, 14a ¶ 3.)[2] SPDC was named as a defendant by Petitioners, but was dismissed by the district court for lack of personal jurisdiction. (*See* Pet. App. at A-170.)

Petitioners Esther Kiobel, *et al.* (collectively "Petitioners" or "Kiobel") are Nigerian nationals who allege that they or their relatives were killed; tortured or subjected to cruel, inhuman, or degrading treatment; unlawfully detained; deprived of their homes and property; or forced into exile by the armed forces and police of the Nigerian government. Kiobel maintains that Shell, through SPDC, "aided and abetted the Nigerian government in committing human rights abuses directed at plaintiffs". (*Id.* at A-21-22.)

B. Proceedings Below

1. The District Court's Decision

On September 29, 2006, the district court entered an order granting in part and denying in part Shell's second motion to dismiss. Acknowledging that "Plaintiffs' claims are essentially claims for secondary liability, i.e., claims that

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[2] *See also* Pet. App. A-181 n.54 ("the Shell entities are holding companies . . . that . . . operate in Nigeria only 'through subsidiaries', specifically SPDC"); A-181-85 (Kiobel has not pleaded a basis for a claim of agency or alter ego liability).

Defendants 'facilitated,' 'conspired with,' 'participated in,' 'aided and abetted,' or 'cooperated with' government actors or government activity" (Pet. App. B-11), the district court began by determining that "where a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well" (*id.* at B-12). The district court then concluded that Kiobel could proceed on the claims for crimes against humanity; torture or cruel, inhuman, and degrading treatment; and arbitrary arrest and detention. The district court dismissed Kiobel's claims regarding extrajudicial killing; rights to life, liberty, security, and association; forced exile; and property destruction. (*See id.* at B-13-23.) However, stating that "[r]easonable minds may differ as to whether any of the acts described above is actionable under the ATS post-*Sosa*", the district court *sua sponte* certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (*Id.* at B-21-23.)

2. The Appeal

Kiobel appealed the dismissal of the extrajudicial killing claim only. Shell cross-appealed, arguing that all of Kiobel's remaining claims should be dismissed.

Shell argued that *Sosa* requires that international law govern not just what conduct is proscribed, but also who may be held liable. (*See, e.g.*, App. 40a-41a, 44a-48a, 58a-60a, 161a-164a, 167a-169a.) In particular, Shell argued that "the law of nations does not attach civil liability to corporations under any circumstance", and offered as

support the fact that the Rome Statute and the charters governing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda "restrict the jurisdiction of those tribunals to 'natural persons' only, excluding corporations from their coverage". (App. 59a.) Shell also discussed how "the drafters of the Rome Statute explicitly considered and declined to recognize corporate liability" (*id.*) and how "when Congress enacted the TVPA, it excluded the possibility of corporate liability for extrajudicial killing (and torture)" (*id.* at 60a).

Kiobel responded to Shell's arguments regarding corporate liability under the ATS by asserting that "Shell incorrectly claims that 'the law of nations does not attach civil liability to corporations under any circumstances'" and arguing that (1) the documents to which Shell cites are the founding documents for entities that apply "international *criminal* law", and (2) "[n]o Court has ever accepted the argument that corporations cannot be held liable in ATS suits". (App. 138a n.31.)

Shell addressed Kiobel's response in its reply brief, arguing that "if the defendant 'is a private actor such as a corporation', the international norm must specifically 'extend[] the scope of liability to such an actor'" (App. 161a (alteration in original)) and that "footnote 20 [of *Sosa*] is part of the Court's holding that the law of nations determines what acts and actors may be held liable under the ATS" (*id.* at 163a).

The issue of corporate liability was also extensively discussed during oral argument, with the

panel asking Kiobel's counsel such questions as: "Has a corporation ever been held liable by any international tribunal for a violation of international law?" (Jan. 12, 2009, Audio Recording of Oral Argument ("Rec." (hours : minutes : seconds)) 0:26:26)[3], and "Would it be fair to say that the concept of corporate liability for a violation of international law is not uniformly or firmly established in international law?" (Rec. 0:32:11). Additionally, after noting that Kiobel was "not able to point to any decision of an international tribunal or . . . court of appeal which has held that a corporation can violate international law" (Rec. 0:33:38), Judge Cabranes suggested that Kiobel submit a supplemental letter on the issue (Rec. 0:34:08). Counsel for Kiobel later did so.[4] (*See* App. 190a-206a.)

3. The Second Circuit's Decision

On September 17, 2010, the Second Circuit unanimously held that this lawsuit should be dismissed, although the panel split on the grounds for dismissal. Following *Sosa*'s instruction that determining whether a norm of international law supports a cause of action under the ATS involves consideration of "whether international law extends

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[3] No official transcript of the argument is available, but Shell will provide a compact disc containing a copy of the official audio recording to the Court upon request.

[4] Although Judge Cabranes suggested the submission of a supplemental letter during oral argument in this case, Kiobel's counsel submitted the letter only in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), heard before the Second Circuit in tandem with *Kiobel*.

the scope of liability for a violation of a given norm to the perpetrator being sued", *Sosa*, 542 U.S. at 732 & n.20, the majority considered whether international law extends the scope of liability for Kiobel's claims to corporations. After finding that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights", the majority concluded that, in light of *Sosa*, the ATS "simply does not confer jurisdiction over suits against corporations" (Pet. App. A-16-17) and dismissed Kiobel's complaint (*id.* at A-81).

Judge Leval, though disagreeing with the majority's reasoning, was "in full agreement that *this* Complaint must be dismissed". (*Id.* at A-90.) He identified two alternate grounds that independently compelled dismissal of Kiobel's claims: (1) the Amended Complaint fails to plead facts supporting a reasonable inference that the defendants acted with a purpose of bringing about human rights abuses as required by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (Pet. App. A-168-69); and (2) "the pleadings do not support a plausible inference that Shell, the parent holding companies, themselves rendered assistance to the Nigerian government" (*id.* at A-181 n.54).

4. The Petitions for Rehearing

On February 4, 2011, the Second Circuit entered orders (1) denying Kiobel's request for panel rehearing (Pet. App. D-3) and (2) denying Kiobel's request for rehearing *en banc* (*id.* at C-2).

Concurring in the denial of Kiobel's request for panel rehearing, Judge Cabranes explained that fidelity to controlling law dictated the majority opinion: "Because corporate liability is not a discernable, much less universal, norm of customary international law, it cannot form the basis of a suit under the ATS. That is the long and short of the matter." (*Id.* at D-24-25.)

After the Second Circuit's issuance of the mandate, Kiobel filed (1) a second petition for rehearing *en banc* and (2) a motion to recall the mandate. On March 1, 2011, the Second Circuit denied Kiobel's motion to recall the mandate (App. 1a- 2a), and denied Kiobel's second petition for rehearing *en banc* as moot (Pet. App. C-7).

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED TO DECIDE WHETHER DISMISSAL SHOULD HAVE BEEN UNDER RULE 12(B)(1) OR 12(B)(6).

Kiobel's first ground for issuance of a writ of certiorari is that the Second Circuit's dismissal for lack of subject matter jurisdiction conflicts with the decisions of this Court and with "every other ATS appellate decision involving a corporate defendant". (Pet. 16 (capitalization altered).) Kiobel is incorrect. Not only did *Sosa* control the Second Circuit's conclusion that corporate liability under the ATS is jurisdictional, but the Second Circuit's decision is consistent with the only other court of appeals to

decide the issue.[5] Furthermore, whether the issue of corporate liability under the ATS is jurisdictional has no bearing on the outcome of this case.

A. The Second Circuit's Decision Does Not Conflict with Any Decision of This Court.

Unlike garden-variety federal statutes providing a cause of action with jurisdiction conferred by the "arising under" language of § 1331, the ATS "creat[es] no new causes of action". *Sosa*, 542 U.S. at 724. Instead, the ATS is "only jurisdictional", *id.* at 712, conferring "original jurisdiction" on the district courts over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States", 28 U.S.C. § 1350. Two criteria must be met before the ATS can provide jurisdiction over claims in violation of the law of nations: (1) a plaintiff alleges a violation of an international law norm with "content and acceptance among civilized nations" at least as definite as "the historical paradigms familiar when § 1350 was enacted", and (2) "international law extends the scope of liability for a violation" of that norm "to the perpetrator being sued". *Sosa*, 542 U.S. at 732 & n.20. Thus, pursuant to *Sosa*, scope of liability—including the identity of the perpetrator being sued—is a jurisdictional issue: if international law

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[5] Neither of the post-Petition appellate decisions addressing corporate liability decide whether the issue is jurisdictional. *See Flomo*, 643 F.3d 1013 (no discussion of whether corporate liability is jurisdictional); *Doe v. Exxon Mobil Corp.*, 2011 WL 2652384, at *20 (finding it "unnecessary to decide" whether corporate liability is jurisdictional).

does not extend liability to the perpetrator-defendant, federal courts are not permitted to recognize a cause of action subject to jurisdiction under the ATS.[6]

Relying principally on *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), Kiobel argues that the Second Circuit's decision amounts to an inappropriate "drive-by jurisdictional" ruling that "miss[es] the critical differences between 'true jurisdictional conditions and nonjurisdictional causes of action'". (Pet. 11 (quoting *Reed Elsevier*, 130 S. Ct. at 1244).) Actually, those cases confirm the soundness of the Second Circuit's decision.

Morrison, *Reed Elsevier*, *Arbaugh*, and *Steel Co.* each involved a statute containing both (1) a substantive provision setting forth certain prohibited behavior or establishing certain rights and (2) an accompanying jurisdictional provision conferring power to adjudicate claims regarding those behaviors

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[6] Kiobel suggests that footnote twenty-one of *Sosa* "treated the issue of corporate liability as a merits-related issue and not a matter of subject matter jurisdiction". (Pet. 14.) Footnote twenty-one, however, merely suggests several possible additional principles limiting the availability of relief for violations of international law. The principle to which Kiobel refers, "case-specific deference to the political branches", *Sosa*, 542 U.S. at 733 n.21, suggests nothing about whether corporate liability under the ATS is an issue of subject matter jurisdiction, but only that satisfaction of the two criteria referenced above may not entitle a plaintiff's claim to proceed.

or rights on the federal courts.[7] It is that type of statute that gives rise to this Court's concern about "drive-by" jurisdictional rulings. When a statute contains both substantive and jurisdictional provisions, courts should not treat substantive provisions as if they create jurisdictional conditions.

Unlike the statutes involved in those cases, the ATS does not include an underlying substantive statutory provision. It was enacted as part of the Judiciary Act of 1789, which specified the jurisdiction of the federal courts, and is codified in Title 28 ("Judiciary and Judicial Procedure"), Section 85 ("District Courts; Jurisdiction") of the United States Code, surrounded by the more familiar jurisdictional provisions covering federal questions, diversity, claims against the United States or foreign nations, and the like. As a result, all of the ingredients the ATS specifies—including a "tort . . .

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[7] *See Morrison*, 130 S. Ct. at 2877 & n.3, 2881-82 (§ 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), prohibits employing "any manipulative or deceptive device or contrivance", and 15 U.S.C. § 78aa grants district courts jurisdiction over violations); *Reed Elsevier*, 130 S. Ct. at 1241, 1245 (the Copyright Act gives copyright holders exclusive rights, *see e.g.*, 17 U.S.C. § 501(a), and 28 U.S.C. § 1331 and 28 U.S.C. § 1338 provide district courts with jurisdiction over infringement actions); *Arbaugh*, 546 U.S. at 515 (Title VII sets forth a right to be free of certain harassment, and 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3) confer jurisdiction over Title VII claims on the federal courts); *Steel Co.*, 523 U.S. at 87, 90 (§ 11046(a)(1) of the Emergency Planning and Community Right-To-Know Act of 1986 provides a right to sue users of toxic chemicals, *see* 42 U.S.C. § 11046(a)(1), and §11046(c) confers the district courts with jurisdiction over such actions, *see* 42 U.S.C. §11046(c)).

committed in violation of the law of nations"—are, by definition, jurisdictional thresholds. 28 U.S.C. § 1350.[8] Thus, scope of liability under the ATS *must* be jurisdictional: unless international law says that liability for a violation of one of its norms extends to the perpetrator being sued, federal courts are not empowered to hear the case.[9]

B. The Second Circuit's Decision Does Not Conflict with the Decisions of Any Other Court of Appeals.

Kiobel maintains that the Second Circuit's "subject matter jurisdiction decision . . . conflicts with virtually every other ATS decision involving a

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[8] The fact that the ATS does not specifically identify the nature of the defendants who may be sued is irrelevant. The ATS clearly states that it confers jurisdiction only over violations of the law of nations; if the law of nations does not extend liability to corporations, they are not subject to jurisdiction under the ATS. Familiar jurisdictional provisions contain similar conditions. For example, 28 U.S.C. § 1331, which confers "arising under" jurisdiction, does not mention the "face of the well-pleaded complaint" doctrine, much less the rule that federal question jurisdiction exists over state-law claims if they necessarily contain a substantial disputed question of federal law, *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312-14 (2005).

[9] Kiobel asserts that the Second Circuit's decision "would transform nearly every issue in an ATS case into an issue of subject matter jurisdiction" and that this would create "serious consequences for the efficient processing of these cases". (Pet. 15.) It is, however, not the Second Circuit's decision that has rendered issues under the ATS jurisdictional, but rather this Court's unanimous determination that the ATS is "only jurisdictional". *Sosa*, 542 U.S. at 729.

corporate defendant".[10] (Pet. 16-17.) Kiobel is wrong.

First, only one other court of appeals has decided whether corporate liability under the ATS is an issue of subject matter jurisdiction, and that court reached the same conclusion as the Second Circuit: it is. *See Romero*, 552 F.3d at 1315 (concluding that "[b]ecause the Alien Tort Statute is jurisdictional" it had to address the defendant's argument "about corporate liability under that statute").

Second, no conflict is created by ATS cases against corporations in which the issue of corporate liability was not raised: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

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[10] Despite this sweeping statement, Kiobel cites to only one case with which the Second Circuit's decision purportedly conflicts, *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004). (Pet. 17.) *Herero*, however, is inapposite. *Herero* was decided before *Sosa* and concluded (1) that "it is not frivolous to assert that [the ATS] creates a cause of action" and (2) that a claim of federal question jurisdiction based on the statute was, therefore, not frivolous. *Herero*, 370 F.3d at 1195. To the extent *Herero* conflicts with the Second Circuit's decision, it also conflicts with *Sosa* and is no longer good law.

C. Whether Corporate Liability Is an Issue of Subject Matter Jurisdiction Is Irrelevant to the Outcome of the Case.

Putting aside the fact that no conflict exists, the Second Circuit could properly have reached the issue of corporate liability even if it were not jurisdictional. Therefore, Kiobel's first question does not justify the grant of a writ of certiorari, because it is of no consequence to the outcome of this case.

As explained *supra*, upon granting in part and denying in part Shell's second motion to dismiss, the district court *sua sponte* certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Pet. App. B-21-23.) The district court sought guidance from the court of appeals as to "the viability of Plaintiffs' claims". (*Id.* at B-23.) Indeed, the district court was powerless to constrict appellate review under 28 U.S.C. § 1292(b) because "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court". *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). Accordingly, pursuant to both the terms of the district court's § 1292(b) certification and *Yamaha*, the Second Circuit was vested with appellate jurisdiction to address *all* grounds for dismissing all or part of the complaint, including the ground of lack of corporate liability under the ATS.[11]

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[11] Kiobel's complaint that the Second Circuit decided the issue of corporate liability under the ATS "*sua sponte*" (Pet. 14; *see* Pet. 3) is without basis. Shell raised the issue of corporate

Swint v. Chambers County Commission, 514 U.S. 35 (1995), cited by Kiobel (Pet. 16 n.7), is inapposite. *Swint* addresses the unavailability of pendent party jurisdiction in an appeal premised on the collateral order doctrine. The scope of an appellate court's jurisdiction under the collateral order doctrine and § 1292(b) are different: the collateral order doctrine permits review of specific issues only, *see Swint*, 514 U.S. at 49-50; as discussed above, § 1292(b) permits review of the entire order issued by the district court.[12]

II. CERTIORARI IS UNWARRANTED TO DECIDE WHETHER THE ATS PROVIDES JURISDICTION OVER CORPORATIONS.

Although there is a nascent conflict between the Second and Seventh and District of Columbia Circuits regarding whether the ATS provides jurisdiction over corporations, granting Kiobel's request for a writ of certiorari is unwarranted for four reasons: (1) the Second Circuit's decision represents a straightforward application of *Sosa*; (2) the Second Circuit's decision is not as far-reaching as Kiobel supposes; (3) this case presents a

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liability under the ATS in its briefing, Kiobel responded, and the issue was discussed at oral argument. *See supra* pages 5-7.

[12] *United States v. Stanley*, 483 U.S. 669 (1987), cited in *Swint*, is also inapposite. *Stanley* admonishes the court of appeals for resurrecting a plaintiff's "long-dismissed FTCA claims", when the only claims addressed in the order on § 1292(b) review were the plaintiff's *Bivens* claims. *Id.* at 677. Here, the Second Circuit confined its review to the order appealed from, and did not rule on any prior orders of the district court.

poor vehicle for review; and (4) review now would be premature.

A. The Second Circuit's Decision Is a Straightforward Application of *Sosa*.

Sosa sets forth a specific methodology for courts to apply before recognizing a claim subject to jurisdiction under the ATS: the claim must assert a violation of a norm of international law with no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted", *Sosa*, 542 U.S. at 732, and international law must "extend[] the scope of liability for a violation of [the] norm to the perpetrator being sued", *id.* at 732 n.20. *Sosa* additionally emphasizes that courts should exercise "caution" when considering whether to recognize a new cause of action, and provides five reasons for that caution: (1) "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint"; (2) "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law"; (3) in the "great majority of cases", "a decision to create a private right of action is one better left to legislative judgment"; (4) "the potential implications for the foreign relations of the United States . . . should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs" because "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of

foreign governments over their own citizens"; and (5) courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity". *Id.* at 725-28 (citations omitted).

In determining that corporate liability does not exist under the ATS, the Second Circuit adhered strictly to *Sosa*'s instructions, first applying *Sosa*'s methodology by scouring the law of nations for any indication of a norm subjecting corporations to liability, and, finding none, exercising *Sosa*'s prescribed caution. Kiobel, however, maintains that the Second Circuit's decision conflicts with *Sosa* in four separate ways: (1) by "ignor[ing] the plain language, history and purpose of the ATS"; (2) by "rest[ing] on a fundamental misinterpretation of footnote 20"; (3) by disregarding the fact "that federal common law provides the cause of action in ATS cases"; and (4) by "ignor[ing] a major source of international []law". (Pet. 26, 31, 34, 37 (capitalization altered).) Not one of those purported conflicts actually exists.

1. The Second Circuit's Decision Does Not Conflict with the Language, History, or Purpose of the ATS.

a. The Language of the ATS

The ATS states that it provides jurisdiction only over "violation[s] of the law of nations or a treaty of the United States". 28 U.S.C. § 1350. Thus, by the terms of the ATS, it is the law of nations and the

treaties of the United States that determine the universe of defendants over which the ATS may assert jurisdiction.[13] As the Second Circuit determined, the law of nations simply does not include corporations in that universe.

b. The History of the ATS

Sosa emphasized three historic examples that animated the ATS: (1) the May 1784 Marbois incident; (2) the case of *Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1,607) (D. S.C. 1795); and (3) the 1795 opinion of Attorney General Bradford, 1 Op. Att'y Gen. 57. *See Sosa*, 542 U.S. at 716-17, 720-21. Each of those incidents concerned redress from natural persons, not corporations.

Kiobel's arguments that "[t]he Founders would have been familiar with the use of tort remedies against corporations when the ATS was enacted" (Pet. 28) and that "[t]he majority ignores the well-established liability of corporations . . . in the law merchant and maritime law, both integral parts of the law of nations at the time the ATS was enacted" (Pet. 29) miss the mark. Even if the Founders were

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[13] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), cited by Kiobel, itself undermines Kiobel's argument that the ATS provides jurisdiction over corporations because its text does not explicitly distinguish among classes of defendants. In *Amerada*, the Second Circuit had held that "'who is within' the scope of [the ATS] is governed by 'evolving standards of international law'". *Id.* at 433. This Court did not dispute that proposition, but merely held that the later-enacted, comprehensive Foreign Sovereign Immunities Act provided the "sole basis for obtaining jurisdiction over a foreign state". *Id.* at 434.

familiar with corporate liability as a matter of *domestic* law, that does not mean they intended to provide for corporate liability under the ATS, which provides jurisdiction only over violations of *the law of nations*.[14] Similarly, *in rem* jurisdiction over ships has nothing to do with corporate liability. The ship in *in rem* cases is neither a corporation nor a litigant. It is merely the subject of the litigation. Indeed, *in rem* jurisdiction negates the applicability of the ATS. *See Moxon v. The Fanny*, 17 F. Cas. 942, 948 (No. 9,895) (D. Pa. 1793) (ATS jurisdiction unavailable in *in rem* action because "[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for"); *see also Sosa*, 542 U.S. at 720.

c. The Purpose of the ATS

Kiobel also maintains that the Second Circuit's decision conflicts with *Sosa* and the purpose of the ATS because "[t]he purpose of the ATS was to provide for broad remedies for law of nations violations against any tortfeasor". (Pet. 30.) *Sosa* says just the opposite: "It was this *narrow* set of violations of the law of nations, admitting of judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to tort." *Sosa*, 542 U.S. at 715 (emphasis added). *Sosa* further admonishes that judicial power with respect to the ATS is limited to recognizing a "*narrow* class of international norms",

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[14] *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2009), cited by Kiobel (Pet. 29), is inapposite. *Exxon* does not mention the law of nations or the ATS.

subject to "vigilant doorkeeping", *id.* at 729 (emphasis added), through the exercise of "judicial caution", *id.* at 725. Indeed, the entire thrust of *Sosa* is the narrowness of ATS jurisdiction and the caution courts should exercise before allowing a claim under the ATS to proceed.

Additionally, Kiobel admits that the ATS "was one of the First Congress' answers to the inability of the Continental Congress to respond to violations of treaties or the law of nations that might escalate into war". (Pet. 28; *see Sosa*, 542 U.S. at 715 (the ATS was adopted to reach "impinge[ments] upon the sovereignty of the foreign nation [which,] if not adequately redressed[,] could rise to an issue of war").) Kiobel suggests no escalation of international tensions that might arise from the decision that Nigerians injured in Nigeria by the Nigerian government with the alleged assistance of a Nigerian corporation should not be able to sue Dutch and English parent corporations in United States courts. Indeed, the history of the ATS suggests that its jurisdiction would not have extended to acts taken within the territory of a foreign sovereign: the thought that United States courts would have reached the Marbois incident had it occurred in Spain is unfathomable. *See Sosa*, 542 U.S. at 727 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.").

2. The Second Circuit's Decision Does Not Conflict with *Sosa* Footnote Twenty.

Footnote twenty of *Sosa* states:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C. 1984) (Edwards J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

Sosa, 542 U.S. at 732 n.20.

Kiobel desires to read the "Compare" signal as limiting the Court's statement, so that courts should consider only whether a norm requires state action. (*See* Pet. 31-32.) Justice Breyer's separate concurrence does not read footnote twenty as Kiobel would have it, *see Sosa*, 542 U.S. at 760 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."), and the Court's analysis of *Sosa*'s complaint itself suggests that the identity of the perpetrator is as important as the nature of the alleged offenses, *see id.* at 737 ("And all of this assumes that Alvarez could establish that Sosa was

acting on behalf of a government when he made the arrest, for otherwise he would need a broader rule still."). Furthermore, Kiobel's position makes no sense. Given *Sosa*'s instruction to exercise caution before recognizing a cause of action subject to ATS jurisdiction, there is no reason courts should limit themselves to considering only whether a norm requires state action. As Kiobel acknowledges, international law treats different types of defendants differently, not only based upon whether they are state actors. (*See* Pet. 33 (acknowledging that international law provides certain immunities to, for example, diplomats and heads of state and that corporations have been excluded from international criminal enforcement mechanisms).) Courts considering whether to exercise ATS jurisdiction should do the same.

3. The Second Circuit's Decision Does Not Conflict with *Sosa*'s View of the Role of Federal Common Law.

Kiobel asserts that "the tort cause of action recognized under the ATS derives from federal common law, not international law" and "[t]he drafters of the ATS understood that the rules of decision in ATS cases would be found in common law". (Pet. 34.) Kiobel's argument evidences a fundamental misunderstanding of the interaction between the ATS and federal common law.

First, a cause of action subject to jurisdiction under the ATS does not "derive" from federal common law. Instead, *Sosa* says that federal courts are empowered to use their ability to *create* federal common law to recognize causes of action *from the*

law of nations that are subject to jurisdiction under the ATS. *See Sosa*, 542 U.S. at 724-25, 732.

Second, *Sosa* places tight controls on when a federal court can use its power to create federal common law to recognize a cause of action subject to jurisdiction under the ATS. Specifically, a court can create causes of action for violations of the law of nations only if that law has sufficiently "definite content and acceptance among civilized nations" and only for which "international law extends the scope of liability . . . to the perpetrator being sued". *Id.* at 732 & n.20. As a result, federal common law does not determine who is subject to suit under the ATS.[15]

Third, Kiobel's complaint that "[t]he majority's reasoning would . . . overturn *Filartiga* because there are equally no cases imposing civil liability on individual torturers under international law" (Pet. 35) is wrong.[16] As Kiobel repeatedly insists, "[i]t is up to each State to determine whether to provide corporate tort liability for violations of the law of nations". (Pet. 36; *see id.* at 35.) In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit concluded that the defendant could be held liable under international criminal law, and therefore could be held liable civilly in tort. *Id.* at

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[15] Even if federal common law determined the scope of liability under the ATS, it would not follow that corporations would be subject to suit. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65-66 (2001) (no corporate liability for *Bivens* actions).

[16] Additionally, as explained in Shell's conditional cross-petition (No. 11-63), Congress displaced the claims recognized in *Filartiga* by enacting the Torture Victim Protection Act, 28 U.S.C. § 1350 note.

876, 880, 887-88. In this case, the Second Circuit correctly determined that Shell cannot be held liable under international criminal law, and, therefore, cannot be held civilly liable in tort. (*See* Pet. App. A-72-76.) Kiobel's argument that the Second Circuit's decision conflicts with *Filartiga* rests on the internally inconsistent premise that courts may create a civil cause of action by borrowing from international criminal law standards applicable to natural persons, but simultaneously strip away all the limitations—such as the absence of corporate liability—that exist in international criminal law.[17] As Kiobel points out, not only have "corporations . . . been excluded from the recently-created international criminal enforcement mechanisms", but even though "many states have included corporations as appropriate defendants under the implementing *legislation* passed to comply with their obligations under the Rome Statute" (Pet. 33 (emphasis added))—which itself excludes the concept

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[17] As *Sosa* observed, because civil law does not contain the same checks as criminal law, it is dubious at the outset for a court unilaterally to create a civil right of action based on a violation of international criminal law. *See Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion."); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone."). Providing for civil liability against corporations, when international criminal law imposes liability only on individuals, requires an even further step.

of corporate liability[18] (*see* Pet. App. A-52-54)—the United States has not enacted any such implementing legislation. Indeed, the Torture Victim Protection Act ("TVPA") specifically excludes corporations from its scope, imposing liability for torture and extrajudicial killing on "individual[s]" only. 28 U.S.C. § 1350 note § 2(a); *see Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010); *Mohamad v. Rajoub*, 634 F.3d 604, 607 (D.C. Cir. 2011). Thus, Kiobel's own argument demonstrates the absence of any universal and obligatory norm of international law that would hold Shell liable for allegedly aiding and abetting human rights violations by the Nigerian government.[19]

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[18] The *Brief of Ambassador David J. Scheffer* ("*Scheffer Brief*") argues that "no conclusion should be drawn regarding the exclusion of corporations from the Rome Statute other than that no timely political consensus could be reached to use this particular treaty-based international court to prosecute corporations under international criminal law for atrocity crimes". (*Scheffer Brief* 9-10.) But that conclusion is exactly what is germane to corporate liability under the ATS—that the negotiators of the Rome Statute could not agree to impose criminal liability (or even civil penalties (*id.* at 8)) on corporations engaging in human rights violations confirms that there is no universal recognition of such liability within international criminal law that can give rise to a federal common law claim subject to jurisdiction under the ATS.

[19] The *Brief of Amici Curiae Nuremberg Scholars* ("*Nuremberg Brief*") argues that because "the Allied Control Council . . . deployed a range of remedial actions to hold both natural and juristic persons accountable for violations of international law", the international law that came out of the Nuremberg trials "unequivocally shows that corporations . . . are the subjects of international law and can be held accountable . . . for violations of international law". (*Nuremberg*

4. The Second Circuit's Decision Did Not Improperly Ignore General Principles of Law Common to Legal Systems.

Kiobel incorrectly asserts that the Second Circuit erred by not taking into account "[g]eneral principles of law common to all legal systems". (Pet 37.)

Brief 2-3, 4.) The Control Council, however, was not a court applying the law of nations, but the interim government established by the Allies to rule Germany. *See* Control Council Proclamation No. 1 Art. II, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/01INT02.pdf. Thus, the laws enacted by the Control Council were domestic laws of Germany, not judicial pronouncements of the law of nations. Additionally, the Allies' dissolution of the Nazi Party and its related entities says nothing about punishment of corporations under international law—the Nazi party was the former governing body of Germany, and its dissolution (as well as the dissolution of its related entities) was the consequence of its military defeat. Furthermore, the *Nuremberg Brief*'s discussion of the dismantling of German industries (at 11-20) has nothing to do with corporate punishment for complicity in human rights violations. The *Nuremberg Brief* itself suggests that those dissolutions were enacted by the victors of war to curtail German economic power, in particular Germany's "industrial cartels". (*Id.* at 4, 11.) Indeed, the law of the American Military Government "promulgated . . . to serve as the legal vehicle for the dissolution of I.G. [Farben] in the American zone" was "a sweeping *antitrust* law designed to prevent monopoly practices". JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 158 (1978) (emphasis added). When the breakup of I.G. Farben was ultimately accomplished in 1953, the shareholders of Farben became the shareholders of the five successor companies, *id.* at 161—hardly a "punishment" under international law.

The fact that a legal norm exists in all nations does not make that norm part of customary international law:

> [T]he mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . (into) the law of nations." It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of [the ATS].

Filartiga, 630 F.2d. at 888 (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)) (first alteration and omission in original). The law of nations concerns the relationship of nations to each other. *See, e.g., Sosa*, 542 U.S. at 714-15. Thus, customary international law results not merely from a consistent practice among states, but from a "general and consistent practice of states *followed by them from a sense of legal obligation*". RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (emphasis added). Accordingly, even if all countries provide for corporate accessorial liability as a matter of domestic law, that is insufficient to incorporate such a norm into the law of nations.[20] Unless states have adopted

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[20] *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) *("FNCB")*, cited by Kiobel (Pet. 37-38), is inapposite. *FNCB* contained no ATS claims. Although Kiobel maintains that *FNCB* "held a corporation

such a norm out of a sense of mutual obligation, the norm has not been incorporated into customary international law. Neither Kiobel nor *amici* cite any evidence demonstrating that has happened here.

B. The Second Circuit's Decision Is Not as Far-Reaching as Kiobel Suggests.

Kiobel posits that the Second Circuit's decision "creat[es] a blanket immunity for corporations engaged or complicit in universally condemned human rights violations" (Pet. 10), thus "invit[ing] corporations to violate universal international norms with impunity" (*id.* at 21). The Second Circuit's decision, however, is not nearly as far-reaching as Kiobel suggests.

The Second Circuit did not hold that corporations are "immune" from liability for human rights violations. (*See* Pet. App. A-15 ("We emphasize that the question before us is not whether corporations are '*immune*' from suit under the ATS . . . .") (emphasis added).) Instead, the Second Circuit explicitly emphasized that nothing "in [its] opinion limit[s] or foreclose[s] criminal, administrative, or civil actions against *any* corporation under a body of law *other than customary international law*-for example, the domestic laws of

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liable for [a] violation of international law" (Pet. 37), the Court actually determined that Banco Para el Comercio Exterior de Cuba was a "government instrumentality" whose "separate judicial status" should be disregarded. *FNCB*, 462 U.S. at 633; *see id.* at 630-32. Accordingly, the set-off permitted was against the government of the Republic of Cuba, not a private corporation.

any State. And, of course, nothing in [its] opinion limits or forecloses legislative action by Congress." (*Id.* at A-19.) Nor does the decision "foreclose[] suits under the ATS against the individual perpetrators of violations of customary international law-including the employees, managers, officers, and directors of a corporation". (*Id.*) Indeed, the Second Circuit's recent decision in *Liu Bo Shan v. China Construction Bank Corp.*, No. 10-2992-cv, 2011 WL 1681995, at *1 (2d Cir. May 5, 2011), reinforces the degree to which *Kiobel* is a narrow holding, leaving open the issue of whether the ATS provides jurisdiction over state-owned corporations.[21]

C. This Case Presents a Poor Vehicle Through Which to Address Corporate Liability Under the ATS.

The essence of Kiobel's complaint is that Dutch and English holding companies should have to answer in a United States court for acts committed in Nigeria by the Nigerian government, allegedly with assistance from their indirect Nigerian subsidiary. (*See* Pet. App. A-181 n.54.) Setting aside the issue of corporate liability, this is not the kind of

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[21] Kiobel concedes that in the past twenty years there has been only one ATS case against a corporation in which plaintiffs have prevailed at trial, one additional default judgment, and "a handful" of settlements. (*See* Pet. 8 n.3; *see also Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1357 (S.D. Fla. 2008) (noting default).) Thus, even given its broadest interpretation, it is hard to imagine how the Second Circuit's decision could have the type of impact—"undermin[ing] the ATS's deterrence of international law violations" (Pet. 21)—Kiobel envisions.

case over which the ATS should provide jurisdiction.[22]

First, the ATS was adopted to reach "impinge[ments] upon the sovereignty of . . . foreign nation[s] [that] if not adequately redressed could rise to an issue of war". *Sosa*, 542 U.S. at 715. Forefront in the drafters' minds were incidents like the Marbois affair of 1784, in which a French adventurer assaulted the Secretary of the French Legion *in Philadelphia*. *See id.* at 716-17. Kiobel suggests nothing about this case—brought by Nigerian citizens against Dutch, English, and Nigerian companies for acts that occurred in Nigeria—that implicates the international affairs of the United States. Indeed, quite to the contrary, the only thing about this case that impinges on the sovereignty of a foreign nation is Kiobel's suit itself, which asks United States courts to pass judgment on Nigeria's treatment of its own citizens and the behavior of purely foreign corporations.[23]

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[22] Should this Court grant Kiobel's petition, Shell intends to raise each of the arguments set forth below as an alternate ground for affirmance.

[23] It is doubtful that even the D.C. Circuit, which has held that the ATS provides jurisdiction over corporations generally, would allow this lawsuit to proceed. *See Doe v. Exxon Mobil Corp.*, 2011 WL 2652384, at *10-11 & n.15 (relying on allegations that some of the defendants, which are United States corporations, "engaged in acts in the United States that were part and parcel of the harm" that plaintiffs had suffered, and stating that "where, as here, plaintiffs may ultimately prove that Exxon provided substantial practical assistance . . . from its offices in the United States, jurisdiction over extraterritorial harm is all the more appropriate").

Second, regardless of whether the ATS reaches corporations generally, it should not reach *these* corporations. As Judge Leval explained: "On the assumption that the Complaint adequately pleads actions of SPDC sufficient to constitute actionable aiding and abetting of Nigeria's human rights abuses, the mere addition of the name of a European holding company to the allegation does not plausibly plead the holding company's involvement." (Pet. App. A-181 n.54.)

Third, as the district court recognized, Kiobel's claims against Shell are "essentially claims for secondary liability, i.e., claims that Defendants 'facilitated,' 'conspired with,' 'participated in,' 'aided and abetted,' or 'cooperated with'" the Nigerian government. (*Id.* at B-11.) Neither the Shell holding companies nor SPDC are alleged to have directly engaged in any acts of extrajudicial killing, torture, arbitrary arrest, or property destruction. Pursuant to the methodology employed in *Sosa*, to determine whether the ATS provides jurisdiction over Kiobel's claims, the proper question is not whether a norm of international law exists, for example, prohibiting extrajudicial killing or aiding and abetting extrajudicial killing, but whether a norm of international law exists that prohibits the specific type of conduct allegedly engaged in by Shell. *See Sosa*, 542 U.S. at 738. Kiobel, however, has not demonstrated the existence of norms of international law prohibiting even the acts attributed to SPDC—for example, requesting increased security from the Nigerian government. (*See* Pet. App. A-178 n.53.)

Fourth, allowing the ATS to provide jurisdiction over Kiobel's claims is incompatible with the serious separation of powers issue that animated *Sosa*. The law of nations concerns relationships among nations. *See Sosa*, 542 U.S. at 714-715. International human rights law principally concerns how nations treat their own citizens. As a result, international human rights law is almost entirely treaty and convention based. Although the United States has bound itself to abide by the terms of several treaties aimed at promoting human rights, the United States Senate has frequently declared that the rights guaranteed and activities prohibited by such treaties are not self-executing, requiring implementing legislation to carry them into effect as domestic law.[24] *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect"); TREATIES AND OTHER INTERNATIONAL AGREEMENTS 4. Because the President and Senate have generally refrained from

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[24] *See, e.g.*, United States Senate Resolution of Ratification, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486, S17491-92 §III (1) (daily ed., Oct. 27, 1990) (Articles 1 through 16 are not self-executing); United States Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 8068, 8071 (1992) (Articles 1 through 27 are not self-executing); *see also* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE ("TREATIES AND OTHER INTERNATIONAL AGREEMENTS") 287 (Comm. Print 2001), *available at*: http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf.

making treaties involving human rights self-executing, allowing claims for human rights violations to proceed under the ATS would be anathema to the Constitutional grant of treaty authority, the delegation to Congress of the power to define the law of nations, and *Sosa*'s directive that courts seek "legislative guidance before exercising innovative authority over substantive law". *Sosa*, 542 U.S. at 726.

Fifth, it would be particularly improper for courts to recognize claims for human rights violations against corporations because when implementing, in part, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment via the TVPA, 28 U.S.C. § 1350 note, Congress excluded corporations from the TVPA's scope. *See Bowoto*, 621 F.3d at 1126; *Mohamad*, 634 F.3d at 607. Instead, Congress provided for civil liability against "[a]n *individual* who . . . subjects an *individual* to torture . . . or subjects an *individual* to extrajudicial killing". 28 U.S.C. § 1350 note § 2(a) (emphases added).

Finally, in recognition of some of the above-described deficiencies in Kiobel's case, the *Kiobel* panel unanimously found that Kiobel had failed to state a claim against Shell. Concurring in the judgment, Judge Leval explained that he was in "full agreement" with the majority "that *this* Complaint must be dismissed". (Pet. App. A-90.) Given the Second Circuit's unanimity with respect to dismissal, a grant of certiorari would have no impact on the outcome of this case, and is, therefore, unwarranted.

See, e.g., *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.")

D. Review of the Issue of Corporate Liability Under the ATS Is Premature.

The intercircuit conflict alleged by Kiobel (Pet. 18-20) involved two Eleventh Circuit cases, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) and *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), that erroneously concluded they were bound by a prior decision, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). The issue of corporate liability, however, was not briefed, argued, or decided on appeal in *Aldana*.

It is only in the last month that the Seventh and District of Columbia Circuits have addressed the issue. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2011 WL 2652384 (D.C. Cir. July 8, 2011). Although those decisions conflict with *Kiobel*, given their recency, the debate they create has not yet had time to mature. Indeed, the issue of corporate liability under the ATS is currently *sub judice* before at least two other circuits—the Ninth Circuit *en banc*, *see Sarei v. Rio Tinto*, Nos. 02-56256, 02-56390 (argued Sept. 21, 2010), and the Fourth Circuit, *see Aziz v. Alcolac, Inc.*, No. 10-1908 (argued May 12, 2011)—both of which may build on or clarify the reasoning of the Second, District of Columbia, and Seventh Circuits.

Accordingly, Shell respectfully submits that a grant of certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

August 12, 2011

Respectfully submitted,

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APPENDIX

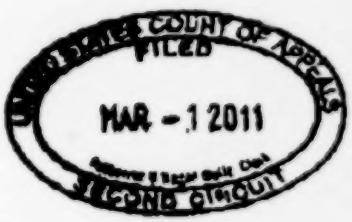
06-4800-cv, 06-4876-cv
Kiobel v. Royal Dutch Petroleum

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of March, two thousand eleven.

PRESENT: DENNIS JACOBS,
Chief Judge,
JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
ROBERT A. KATZMANN,
REENA RAGGI,
RICHARD C. WESLEY,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
RAYMOND J. LOHIER, Jr.,
Circuit Judges.



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KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENTE TUSIMA,

Plaintiffs-Appellants-Cross-Appellees,

- v.- 06-4800-cv
06-4876-cv

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

Defendants-Appellees-Cross-Appellants,

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Defendant.

----------x

ORDER

The mandate issued on February 17, 2011 following the Court's Order denying rehearing in banc. Plaintiffs-Appellants-Cross-Appellees filed a motion to recall the mandate in order for the Court to consider Plaintiffs-Appellants-Cross-Appellees' Second Petition for Rehearing *En Banc*. There being no majority of active judges in favor of recalling the mandate, Plaintiffs-Appellants-Cross-Appellees' motion is hereby **DENIED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, et al., Plaintiffs, vs. SHELL PETROLEUM DEVELOPMENT CO. OF NIGERIA LTD., Defendant.	04 Civ. 2665 (KMW) (HBP) DECLARATION OF BABATUNDE ARIBIDO
ESTHER KIOBEL, et al., Plaintiffs, vs. ROYAL DUTCH PETROLEUM CO., et al., Defendants.	02 Civ. 7618 (KMW) (HBP)

Babatunde Aribido declares under penalty of perjury:

1. I am the Legal Manager and Company Secretary of Shell Petroleum Development Company of

Nigeria Limited ("SPDC"). I am familiar with the corporate records and activities of SPDC. I have personal knowledge of the facts hereinafter stated, and said facts are true and correct to the best of my knowledge and belief with respect to all times relevant to the allegations of the complaints filed herein. I have been requested in particular to describe facts in the period January 1990 to August 2004 (the "Declaration Period"), and all statements made (unless otherwise indicated) have been true throughout the Declaration Period (and remain true today).

2. SPDC is a company incorporated and existing under the laws of the Republic of Nigeria, doing business in Nigeria with its principal place of business in Nigeria. The Board of Directors, which has consisted of between seven and eleven members, meets in Nigeria. The shareholders' meetings of SPDC are held in Nigeria.

3. SPDC is the operator of a Joint-Venture Agreement involving the Nigerian National Petroleum Corporation ("NNPC"), SPDC, Elf Petroleum Nigeria Limited ("EPNL") and Nigerian Agip Oil Company. The interests in the Joint-Venture are as follows: NNPC's interest has varied between 60 and 55%, SPDC 30%, Elf Petroleum Nigeria Limited's interest has varied between 10 and 5% and Nigerian Agip Oil Company 5%.

4. SPDC sells its equity share of the crude oil produced in the Joint-Venture to Shell International Trading Company ("SITCO") (or its successor) through a direct arms-length commercial sales agreement. SPDC plays no part in determining to whom SITCO sells the crude oil or the location to which the crude oil

is shipped. SPDC does not sell any products in the United States. This was true during the Declaration Period, and remains true until today.

5. Prior to a corporate restructuring in July 2005, Royal Dutch Petroleum Company ("Royal Dutch"), a Dutch company, and The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"), an English company, together owned, directly or indirectly, investments in various companies, which for convenience were known collectively as the Royal Dutch/Shell Group of Companies.[1] During the Declaration Period, SPDC, a wholly owned subsidiary of Royal Dutch and Shell Transport, was part of the Royal Dutch/Shell Group of Companies.

6. During the Declaration Period, SPDC was a separate and distinct corporation from Royal Dutch and Shell Transport and the other individual affiliated companies in the Royal Dutch/Shell Group of Companies, including the Shell Oil Company. SPDC was a separate entity, for tax and other corporate purposes from Royal Dutch, Shell Transport, Shell Oil Company and the other affiliated companies within the Royal Dutch Shell/Group of Companies. SPDC had its own officers and capital, including operating capital; corporate structure; facilities; work forces; business records; bank accounts; tax returns; financial

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[1] On July 20, 2005, Royal Dutch and Shell Transport were acquired by Royal Dutch Shell, p.l.c. ("Royal Dutch Shell"). On December 21, 2005, Royal Dutch merged with its subsidiary Shell Petroleum N.V., with Shell Petroleum N.V. as the survivor. Subsequent to its acquisition by Royal Dutch Shell, Shell Transport changed its legal form and is now known as the Shell Transport and Trading Company, Ltd.

statements; budgets; and corporate reports. This was true during the Declaration Period and remains true today after the corporate restructuring with respect to Royal Dutch Shell together with all of its consolidated subsidiaries.

7. In the Declaration Period, SPDC has not, either by itself or through its agents:

a. had an office, employee, place of business, postal address, or telephone listing in the United States, including in the State of New York;

b. regularly carried on, contracted or solicited business in the United States, including in the State of New York;

c. been licensed or applied for a license to do business in any state or territory of the United States, including in the State of New York;

d. had or been required to have a designated agent for service of process in the United States, including in the State of New York;

e. owned, used or possessed any real property in the United States, including in the State of New York;

f. contracted to supply any goods or services in the United States, including in the State of New York;

g. had any agents assigned to work for it on a regular basis in the United States, including in the State of New York;

h. maintained any bank accounts or other property in the United States, including in the State of New York;

i. had any of its stock listed on any stock exchange in the United States, including in the State of New York; or

j. advertised in the United States, including in the State of New York.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in PORT HARCOURT, NIGERIA

on 25 day of January, 2007

s/ Babatunde Aribido

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, individually and as Administrator of the Estate of his deceased father KEN SARO-WIWA, OWENS WIWA and BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, Plaintiffs, -against- ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, p.l.c., Defendants.	96 Civ. 8386 (KMW) Before Magistrate Judge Henry B. Pitman DECLARATION OF ROBBERT VAN DER VLIST

ROBBERT VAN DER VLIST declares:

1. I am the General Attorney of N.V. Koninklijke Nederlandsche Petroleum Maatschappij, known as Royal Dutch Petroleum Company ("Royal Dutch"). I am familiar with the corporate records and activities of Royal Dutch. I have personal knowledge of the facts hereinafter stated, and said facts are true and correct to the best of my knowledge and belief at all times

relevant to the allegations of the complaint filed herein.

2. Royal Dutch is a public company organized and existing under the laws of The Netherlands with its principal and only place of business in The Hague, The Netherlands. The Supervisory Board of Royal Dutch, which consists of seven members (none of whom is an employee of Shell Oil Company), and the Board of Management of Royal Dutch, which consists of three members (none of whom is an employee of Shell Oil Company), meet in The Netherlands. The shareholders' meetings of Royal Dutch are held in The Netherlands, as required by the law of The Netherlands.

3. Royal Dutch is a holding company. Royal Dutch and another corporation (The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"), an English company) together own, directly or indirectly, investments in various companies known collectively as the Royal Dutch/Shell Group of companies. As such, Royal Dutch is solely an investment vehicle. Royal Dutch does not engage in operational activities. It derives the whole of its income, except for interest income on cash flow balances or short-term investments, from its interest in the companies known collectively as the Royal Dutch/Shell Group of companies.

4. Royal Dutch is a corporation separate and distinct from Shell Transport. Royal Dutch is a corporation separate and distinct from the individual companies in which Royal Dutch and Shell Transport directly or indirectly own investments, which are for convenience referred to collectively as the Royal Dutch/Shell Group of companies. The use of the phrase

"Royal Dutch/Shell Group of companies" is a convenience to refer collectively to these various separate and distinct entities; the "Royal Dutch/Shell Group of companies" is not a separate entity.

5. Royal Dutch and Shell Transport own, directly or indirectly, three holding companies, namely Shell Petroleum N.V., a corporation duly organized and existing under the laws of The Netherlands; The Shell Petroleum Company Limited, a corporation duly organized and existing under the laws of England; and Shell Petroleum Inc., a corporation duly organized and existing under the laws of Delaware. Shell Petroleum N.V. and The Shell Petroleum Company Limited between them hold all of the shares in various service companies and, directly or indirectly, interests in various operating companies. For example The Shell Petroleum Company Limited is the beneficial owner of all the shares of The Shell Petroleum Development Company of Nigeria Limited, a Nigerian corporation doing business in Nigeria.

6. Royal Dutch has not (except for activities related to having its shares listed on the New York Stock Exchange), at any time relevant to the allegations of the complaint filed herein, either by itself or through its agents:

a. had an office, employee, place of business, postal address, or telephone listing in the United States, including in the State of New York;

b. regularly carried on, contracted or solicited business in the United States, including in the State of New York;

c. been licensed or applied for a license to do business in any state or territory of the United States, including in the State of New York;

d. had or been required to have a designated agent for service of process in the United States, including in the State of New York;

e. owned, used or possessed any real property located in the United States, including in the State of New York;

f. contracted to supply any goods or services in the United States, including in the State of New York,

g. had any agents assigned to work for it on a regular basis in the United States, including in the State of New York; or

h. maintained any bank accounts or other property in the United States, including in the State of New York.

7. Shell Oil Company is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in Houston, Harris County, Texas. Shell Oil Company is wholly owned by Shell Petroleum Inc.. Shell Oil Company is principally engaged in the exploration, development, production, purchase, transportation and marketing of crude oil and natural gas, and the purchase, manufacture, transportation and marketing of oil and chemical products. The business and affairs of Shell Oil Company are managed by and under the direction of its Board of Directors. The Board of

Directors of Shell Oil Company consists of eleven directors, seven of whom are not employed by Royal Dutch, Shell Transport, Shell Oil Company or any company of the Royal Dutch/Shell Group of companies. The Board of Directors of Shell Oil Company meets in the United States.

8. Royal Dutch is a separate entity, for tax and other purposes, from Shell Oil Company. Thus, the officers of Royal Dutch and the officers of Shell Oil Company are different individuals; Shell Oil Company has its own capital, including its own operating capital; and Shell Oil Company has its own employee benefit programs. Shell Oil Company is not the alter ego of Royal Dutch, is not a branch, division or department of Royal Dutch, is not the assumed, business, trade, or other name of Royal Dutch and was not formed by Royal Dutch for tax or corporate finance purposes to conduct the business of Royal Dutch in the United States.

9. There are no employees of Royal Dutch at Shell Oil Company's offices in New York.

10. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in The Hague, Netherlands
on 25th March, 1997.

s/ Robbert van der Vlist

Robbert van der Vlist

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Ken WIWA, individually and as Administrator of the Estate of his deceased father KEN SARO-WIWA, OWENS WIWA AND BLESSING KPUINEN, individually and as Administratix of the Estate of her husband, JOHN KPUINEN. Plaintiffs, - against - ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, p.l.c., Defendants	96 Civ. 8386 (KMW) Before Magistrate Judge Henry B. Pitman DECLARATION OF JYOTI MUNSIFF

JYOTI MUNSIFF declares:

1. I am the Secretary of The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"). I am familiar with the corporate records and activities of Shell Transport. I have personal knowledge of the facts hereinafter stated, and said facts are true and correct to the best of my knowledge and belief at all times

relevant to the allegations of the complaint filed herein.

2. Shell Transport is a public company organised and existing under the laws of England with its principal and only place of business in London, England. The Board of Directors of Shell Transport, which consists of 8 members (none of whom is an employee of Shell Oil Company), meets in England. The shareholders' meetings of Shell Transport are also held in England.

3. Shell Transport is a holding company. Shell Transport and another corporation (Royal Dutch Petroleum Company ("Royal Dutch"), a Dutch company) together own, directly or indirectly, investments in various companies known collectively as the Royal Dutch/Shell group of companies. As such, Shell Transport is solely an investment vehicle. Shell Transport does not engage in operational activities. It derives the whole of its income, except for interest income on cash flow balances or short-term investments, from its interest in the companies known collectively as the Royal Dutch/Shell group of companies.

4. Shell Transport is a corporation separate and distinct from Royal Dutch. Shell Transport is a corporation separate and distinct from the individual companies in which Royal Dutch and Shell Transport directly or indirectly own investments, which are for convenience referred to collectively as the Royal Dutch/Shell group of companies. The use of the phrase "Royal Dutch/Shell group of companies" is a convenience to refer collectively to these various

separate and distinct entities; the "Royal Dutch/Shell group of companies" is not a separate entity.

5. Shell Transport has not (except for activities related to having American Depositary Receipts), at any time relevant to the allegations of the complaint filed herein, either by itself or through its agents:

(a) had an office, employee, place of business, postal address, or telephone listing in the United States, including in the State of New York;

(b) regularly carried on, contracted or solicited business in the United States, including in the State of New York;

(c) been licensed or applied for a license to do business in any state or territory of the United States, including in the State of New York;

(d) had or been required to have a designated agent for service of process in the United States, including in the State of New York;

(e) owned, used or possessed any real property located in the United States, including in the State of New York;

(f) contracted to supply any goods or services in the United States, including in the State of New York;

(g) had any agents assigned to work for it on a regular basis in the United States, including in the State of New York; or

(h) maintained any bank accounts or other property in the United States, including in the State of New York.

6. Shell Oil Company is a corporation duly organised and existing under the laws of the State of Delaware, with its principal place of business in Houston, Harris County, Texas. Shell Transport is a separate entity, for tax and other purposes, from Shell Oil Company. Thus, the officers of Shell Transport and the officers of Shell Oil Company are different individuals; Shell Oil Company has its own capital, including its own operating capital; and Shell Oil Company has its own employee benefit programs. Shell Oil Company is not the alter ego of Shell Transport, is not a branch, division or department of Shell Transport, is not the assumed, business, trade or other name of Shell Transport, and was not formed by Shell Transport for tax or corporate finance purposes to conduct the business of Shell Transport in the United States.

7. There are no employees of Shell Transport at Shell Oil Company's offices in New York.

8. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in London, England
on 24th March, 1997.

s/ Joyti Munsiff
Jyoti Munsiff

06-4800,
06-4876

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA

Plaintiffs-Appellants-Cross-Appellees,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

Defendants-Appellees-Cross-Appellants,

and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES/CROSS-APPELLANTS

(Caption continued)

June 6, 2007

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Attorneys for Defendants-Appellees/Cross-Appellants Shell Petroleum N.V. (successor to Royal Dutch Petroleum Company) and the Shell Transport and Trading Company, Ltd. (formerly known as Shell Transport and Trading Company, p.l.c.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

1. Appellee/Cross-Appellant Shell Petroleum N.V., successor to Royal Dutch Petroleum Company, is a wholly owned subsidiary of Royal Dutch Shell, p.l.c.

2. Appellee/Cross-Appellant the Shell Transport and Trading Company, Ltd., formerly known as Shell Transport and Trading Company, p.l.c., is a wholly owned subsidiary of co-Appellee/Cross-Appellant Shell Petroleum N.V., except for one share which is held by a dividend access trust for the benefit of one of Royal Dutch Shell, p.l.c.'s classes of ordinary shares.

3. Royal Dutch Shell, p.l.c. is a publicly traded company. No publicly traded company has a ten percent or greater stock ownership in Royal Dutch Shell, p.l.c.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF FACTS 1

JURISDICTIONAL STATEMENT 3

STATEMENT OF ISSUES AND STANDARD OF REVIEW 4

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. *SOSA* CONTROLS THE EVALUATION OF ATS CLAIMS 12

A. *Sosa* Restricts ATS Claims to Universally Accepted and Concretely Defined Violations of the Law of Nations. 13

B. *Sosa* Requires Courts to Determine Whether the Specific Acts of Defendants Violate Definite Norms Accepted Among Civilized Nations, Not Whether Defendants Conspired With, or Aided or Abetted the Violations of, Others. 15

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF THE KIOBEL PLAINTIFFS' EXTRAJUDICIAL KILLING CLAIM. 19

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations. 19

B. The Kiobel Plaintiffs' Extrajudicial Killing Claim Is Defective Because the Shell Parties Are Not State Actors. 26

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Extrajudicial Killing. 28

D. The Kiobel Plaintiffs' Extrajudicial Killing Claim Does Not Survive the TVPA. 32

III. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' TORTURE/CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIM. 37

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations. 37

B. The Kiobel Plaintiffs' Torture/Cruel, Inhuman and Degrading Treatment Claim Is Defective Because the Shell Parties Are Not State Actors. 41

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for Torture or Cruel, Inhuman and Degrading Treatment 41

D. The Kiobel Plaintiffs' Torture/Cruel, Inhuman and Degrading Treatment Claim Does Not Survive the TVPA. 42

IV. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' CRIMES AGAINST HUMANITY CLAIM. 43

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations. 43

B. "Crimes Against Humanity" Does Not Meet *Sosa*'s Requirement of "Definite Content." 44

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Crimes Against Humanity. 47

V. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' ARBITRARY ARREST AND DETENTION CLAIM. 47

A. The Amended Complaint Does Not State a Claim in Violation of the Law of Nations. 47

B. "Arbitrary Arrest and Detention" Is Not Well-Defined Under the Law of Nations. 48

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Arbitrary Arrest and Detention. ... 51

CONCLUSION 52

TABLE OF AUTHORITIES

Page(s)

Cases

Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005) 34, 39

Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987) 11

Arbaugh v. Y&H Corp., 546 U.S. 500, 126 S. Ct. 1235 (2006) 4

Arndt v. UBS AG, 342 F. Supp. 2d 132 (E.D.N.Y. 2004) 32

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 24

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005) 34, 36

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) ..... *passim*

Filetech S.A. v. France Telecom S.A., 157 F.3d 922 (2d Cir. 1998) 4

Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003) ..... *passim*

IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975) 20

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) ..... *passim*

Olivia v. United States Dep't of Justice, 433 F.3d 229 (2d Cir. 2005) 33

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ..... *passim*

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) 15

The Paquete Habana, 175 U.S. 677 (1900) 32

United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) 17, 33

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) 33

Wiwa v. Royal Dutch Petroleum Co., No. 06 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) 6

Constitution, Statutes and Rules

U.S. Const. art. I, § 8 23

U.S. Const. art II, § 2 23

28 U.S.C. § 1292(b) 4, 9

28 U.S.C. § 1350 ..... *passim*

Act of April 30, 1790, ch. 9, § 10, 1 Stat. 114 (1790) 18

Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986) 23

Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6082 (1996) 23

Tariff Act of 1930, 19 U.S.C. § 1307 (2000) 23

Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note ..... *passim*

Cuban Assets Control Regulations, 31 C.F.R. Part 515 23

Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986) 23

Fed. R. Civ. P. 12(h)(3) 4

International Materials

Draft Statute for the International Criminal Court, art. 23, U.N. Doc. A/Conf. 183/2/Add.1 (1998) 30

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 39

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STATEMENT OF FACTS[1]

Defendants Shell Petroleum N.V. and the Shell Transport and Trading Company, Ltd. ("Shell Transport") (collectively, the "Shell Parties"), who are Cross-Appellants in No. 06-4876 and Appellees in No. 06-4800, are foreign holding companies.[2] (*Wiwa, et al. v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (S.D.N.Y.) ("*Wiwa*") Docket Entry No. 4, at 3 (van der Vlist Decl. ¶¶ 2-3), (Munsiff Decl. ¶¶ 2-3).) Shell Petroleum N.V. is a Dutch company with its principal and only place of business in The Hague, The Netherlands. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 2).) Shell Transport is a U.K. company with its principal and only place of business in London, England. (*Wiwa* Docket Entry No. 4, at 3 (Munsiff Decl. ¶ 2).) Shell Petroleum N.V. and Shell Transport are solely investment vehicles. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 3), (Munsiff Decl. ¶ 3).) They are holding companies which own together, directly or indirectly, investments in various companies located throughout the world. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 3), (Munsiff Decl. ¶ 3).). They do not engage in

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[1] Other than disputed issues going to jurisdictional facts, for the purpose of this appeal only, we treat the facts pleaded as true, even though discovery has shown many of them to be false.

[2] The Kiobel Plaintiffs sued Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c. The Amended Complaint still names those companies as defendants. Because of changes in corporate form (unrelated to the allegations in this lawsuit) the successors to those companies are Shell Petroleum N.V. and Shell Transport and Trading Company, Ltd., respectively. (*Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618 (S.D.N.Y.) ("*Kiobel*") Docket Entry No. 158, at 1 n.1.)

operational activities in Nigeria or elsewhere, and derive the whole of their income, except for interest income on cash flow balances or short-term investments, from their shareholding investments. (*Wiwa* Docket Entry No. 4, at 3 (van der Vlist Decl. ¶ 3), (Munsiff Decl. ¶ 3).)

Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC") is also a named defendant in the district court, but did not join in the Shell Parties' motion to dismiss, was not a party to the order on review, and consequently is not a party to the present appeal. Starting in 1958, SPDC operated oil production facilities in Nigeria, and has had employees located in Nigeria. (JA 0129, ¶ 32.) SPDC ceased oil production operations in Ogoniland in 1993. SPDC is a corporation separate and distinct from the Shell Parties. (*Kiobel* Un-numbered Docket Entry between Nos. 167-68, at 3 (SPDC's Memorandum of Law in support of its motion to dismiss, Arbido Decl. ¶ 6).) It has its own: (1) Board of Directors, who direct the business and affairs of SPDC; (2) officers; (3) capital, including operating capital; (4) corporate structure; (5) facilities; (6) work forces; (7) business records; (8) bank accounts; (9) tax returns; (10) financial statements; (11) budgets; and (12) corporate reports. (*Id.*)

Plaintiffs Esther Kiobel, et al., who are Appellants in No. 06-4800 and Cross-Appellees in No. 06-4876 (the "Kiobel Plaintiffs"), are Nigerians who allege, on behalf of themselves and a putative class of similarly situated persons, that they were victims of human rights violations perpetrated by the Nigerian government with the assistance, cooperation, facilitation, etc. of SPDC and the Shell Parties. (JA 0116-17, ¶ 1.) The Kiobel Plaintiffs contend that those violations were the

result of a strategy to depopulate the areas of an oil concession area in the Niger Delta to facilitate the oil exploration and development activities of SPDC. (JA 0117, ¶ 1.) The Kiobel Plaintiffs' allegations forming the basis of defendants' liability stem from actions that SPDC, not the Shell Parties, allegedly took in connection with SPDC's oil production business.

JURISDICTIONAL STATEMENT

None of the alleged actions taken by the Shell Parties constitutes a violation of the law of nations. Accordingly, the federal courts lack subject matter jurisdiction over this lawsuit. As this Court has previously explained:

> Because the Alien Tort Act requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" formula of section 1331. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980). Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995). "'[O]n a challeng[e] [to] the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings.'" *Flores v. Southern Peru Copper*

Corp., 414 F.3d 233, 255 n.30 (2d Cir. 2003) (quoting *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998)). Lack of subject matter jurisdiction may be raised at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1240 (2006); Fed. R. Civ. P. 12(h)(3).

Pursuant to 28 U.S.C. § 1292(b), this Court has appellate jurisdiction to review the district court's order denying in part the Shell Parties' motion to dismiss.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether the district court correctly held that the allegations in Count I concerning "extrajudicial killing" fail to state a cause of action under *Sosa*.

2. Whether the district court incorrectly held that the allegations in Count III concerning "torture/cruel, inhuman and degrading treatment" state a cause of action under *Sosa*.

3. Whether the district court incorrectly held that the allegations in Count II concerning "crimes against humanity" state a cause of action under *Sosa*.

4. Whether the district court incorrectly held that the allegations in Count IV concerning "arbitrary arrest and detention" state a cause of action under *Sosa*.

5. Whether the federal courts lack subject matter jurisdiction because the Kiobel Plaintiffs have not pleaded any well-defined violation of the law of nations sufficient to vest the federal courts with subject matter jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").

The standard of review for each of these issues is *de novo*. *See Flores*, 414 F.3d at 241.

STATEMENT OF THE CASE

On September 20, 2002, the Kiobel Plaintiffs filed a complaint against the Shell Parties that was patterned after the complaint filed approximately six years earlier in *Wiwa*. (*Compare* JA 0116-51 *with Wiwa* Docket Entry No. 1.) Because the allegations in *Wiwa* and *Kiobel* were so similar, the district court consolidated the two cases for discovery purposes one month later. (*See Kiobel* Un-numbered Docket Entry between Nos. 4 and 5 (Stipulation and Order).)

The consolidated discovery taken by the Kiobel and Wiwa Plaintiffs was quite substantial. Discovery closed in May 2004.[3] On May 17, 2004, shortly before the close of discovery, the Kiobel Plaintiffs filed their Amended Complaint. That Amended Complaint contains two important differences from the original Kiobel complaint. *First*, recognizing that all the evidence showed that the Shell Parties were purely holding companies with no activities in Nigeria, the

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[3] There remain some outstanding discovery disputes pending before the Magistrate Judge.

Kiobel Plaintiffs amended to add SPDC as a party. (*Compare* Kiobel Docket Entry No. 1 *with* JA 0116-17.)

Second, in refusing to dismiss the *Wiwa* complaint, the district court relied heavily on an allegation that the Shell Parties and Nigerian government officials met "in London and the Netherlands concerning MOSOP, and coordination at the anti-MOSOP campaign." *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *13 n.14 (S.D.N.Y. Feb. 28, 2002). The Kiobel Plaintiffs, in their original complaint, had copied that allegation from the *Wiwa* complaint, alleging:

> Shell's cessation of operations deprived both Shell and the Government of a significant source of revenue. They therefore determined to develop a plan to provide the civil tranquility that would allow Shell to restart its Ogoniland operations. On or about February 15, 1993 through February 18, 1993, Shell met with Nigerian officials in the Netherlands and England to formulate a strategy to suppress MOSOP. Nigerian officials made clear to Shell their interest in effectuating Shell's return to Ogoniland. Based on past behavior, Shell knew that the means used in that endeavor would include military violence against Ogoni civilians.

(*Kiobel* Docket Entry No. 1, ¶ 4.) In their original complaint, the Kiobel Plaintiffs also alleged:

> On or about March 16, 1995, top executives of Shell International Petroleum Company, Ltd. ("SIPC") met in Shell Centre, London with the

> Nigerian High Commissioner and top Nigerian military officers to discuss common strategy regarding the Ogoni campaign including a joint media campaign and other action.

(*Id.*, ¶ 61.)

Because, after years of discovery, the Wiwa and Kiobel Plaintiffs had learned that no such meetings took place, the Kiobel Plaintiffs, when amending their complaint, deleted the allegations that the Shell Parties met with the Nigerian government. (*Compare* Kiobel Docket No. 1, ¶ 41 *with* JA 0132, ¶ 45; *compare* Kiobel Docket No. 1, ¶ 61 *with* JA 0116-51.) The district court later compelled the Wiwa Plaintiffs to also amend their complaint by deleting similar allegations. (*Wiwa* Docket No. 202, 6-7.)

The Kiobel Plaintiffs' claims are based on alleged violations of the law of nations. Under the ATS, Congress granted the federal courts jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Shell Parties moved to dismiss all the Kiobel Plaintiffs' causes of action for failure to state a claim. Before the district court decided the Shell Parties' motion to dismiss,[4] the

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[4] The Kiobel Plaintiffs state that "[a]lthough [the *Sosa* decision] predated the filing of Defendants' motion, Defendants did not raise *Sosa* in their opening brief." Opening Brief for Plaintiffs-Appellants, at 4 n.2. The Shell Parties served their opening brief on June 1, 2004, twenty-eight days *before* the Supreme Court decided *Sosa*. The Shell Parties did not file that brief until July 15, 2004, because the Magistrate's local rules state that "[n]o motion papers shall be filed until the motion has been fully briefed." *See* Individual Practices of Mag. Judge Henry Pittman,

Supreme Court handed down its first decision in a case brought under the ATS: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The *Sosa* decision significantly changed the landscape for actions brought under the ATS, holding that the ATS was "only jurisdictional," *id.* at 712, and "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.* The Supreme Court held that, to state a cause of action cognizable under the ATS for a violation of the law of nations, the norm for which recovery is sought must be "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. Only a "narrow class of international norms" would satisfy *Sosa*'s "high bar." *Id.* at 727, 729.

In light of *Sosa*, the Shell Parties argued that the Amended Complaint must be dismissed in its entirety. The district court, holding that "Plaintiffs' claims are essentially claims for secondary liability," concluded that "[i]t is a close question whether, following *Sosa*, private individuals can be held liable under the ATS for aiding and abetting violations of international law." (Order, September 29, 2006 ("District Court Order") (JA 0011-12).) However, the district court did not resolve that "close question" by examining each claim brought by the Kiobel Plaintiffs against the Shell Parties and asking whether the conduct alleged violated a well-defined and universally accepted international norm, comparable in specificity and

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dated July 15, 1998, § 2D. As the district court found, "*Sosa* was decided four weeks after Defendants' motion to dismiss was served . . . . [T]herefore [the Shell Parties' *Sosa*] argument is not procedurally barred." (JA 0170-71.)

acceptance to the 18th-century paradigms identified in *Sosa*. Instead, the district court rejected four of the Kiobel Plaintiffs' causes of action as having no well-settled definition or universal acceptance in the abstract, and held that, for the three counts as to which the ATS might grant jurisdiction as to a claim against someone "where a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well." (JA 0012.) Thus, the district court dismissed four of the Kiobel Plaintiffs' seven causes of action for failure to state a claim, but refused to dismiss the three remaining causes of action, holding that they stated claims for aiding and abetting violations of customary international law.[5] (JA 0012-21, 23.) The district court, *sua sponte*, certified its order for immediate appeal under 28 U.S.C. § 1292(b). (JA 0021-23.)

Both the Kiobel Plaintiffs and the Shell Parties petitioned for interlocutory review.[6] This Court

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[5] The Kiobel Plaintiffs asserted seven causes of action: (I) extrajudicial killings; (II) crimes against humanity; (III) torture/cruel, inhuman and degrading treatment; (IV) arbitrary arrest and detention; (V) rights to life, liberty, security and association; (VI) forced exile; and (VII) property destruction. (JA 0144-49.) The district court dismissed Counts I, V, VI and VII, but refused to dismiss Counts II, III and IV. (JA 0012-21, 23.)

[6] In No. 06-4800, the Kiobel Plaintiffs appeal the dismissal of Count I only; in No. 06-4876, the Shell Parties appeal the district court's refusal to dismiss the Amended Complaint in its entirety (*i.e.*, Counts II, III and IV). The Kiobel Plaintiffs have not appealed the district court's dismissal of Counts V (right to life, liberty, security and association), VI (forced exile) or VII (property destruction).

granted those petitions on December 27, 2006. (JA 0097.) The appeal and cross-appeal in *Kiobel* have been recommended for tandem consideration with another case raising similar issues: *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 07-0016. In that case, the United States, as *amicus curiae*, has submitted a brief urging this Court to reject all claims for civil secondary liability under the ATS for any violations of the law of nations, and has stated:

> This Court has ordered the appeal in *Kiobel v. Royal Dutch Petroleum Corp.*, Nos. 06-4800, 06-4876, to be heard in tandem with this case. Although the United States will not file an amicus brief in the *Kiobel* case, we note that our arguments here are equally applicable to the *Kiobel* district court's determination that claims for aiding and abetting liability are available under the ATS.

Brief of the United States as amicus curiae, at 5 n.1, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 07-0016 (2d Cir. May 15, 2007).

SUMMARY OF ARGUMENT

The Kiobel Plaintiffs' claims are "essentially claims for secondary liability." (JA 0011.) The Kiobel Plaintiffs allege that the Nigerian government engaged in extrajudicial killing, torture, cruel, inhuman and degrading treatment, crimes against humanity and arbitrary arrest and detention. There is no allegation that the Shell Parties committed any of those acts. Instead, the Kiobel Plaintiffs allege that the Shell Parties, either knowingly or recklessly, encouraged or assisted those acts by requesting police protection or

providing supplies, arms and ammunition and information to the Nigerian government.

The pertinent question, under *Sosa*, is not whether there is (or should be) a general rule against aiding and abetting or conspiracy under the law of nations. Instead, *Sosa* dictates that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. Relevant to that inquiry is "whether international law extends the scope of liability *for a violation of a given norm to the perpetrator being sued*." *Id.* at 732 n.20 (emphasis added). Likewise, in *Kadic*, this Court held:

> In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant."

70 F.3d at 241 (quoting *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987)).

Here, a particularized examination of each of the counts of the Amended Complaint at issue (Counts I-IV) demonstrates that there exists no norm meeting *Sosa*'s standard that would support a colorable claim against the Shell Parties themselves for violation of the

law of nations. Accordingly, not only have the Kiobel Plaintiffs failed to state any claim against the Shell Parties, but they have not stated a claim sufficient to invoke the jurisdiction of the federal courts under the ATS.

ARGUMENT

I. *SOSA* CONTROLS THE EVALUATION OF ATS CLAIMS.

In *Sosa*, a Mexican national sued under the ATS to redress his alleged arrest and detention by other Mexican nationals at the behest of the United States Drug Enforcement Administration. 542 U.S. at 697-98. The Supreme Court dismissed the plaintiff's ATS claim, holding that the alleged arrest and detention did not violate a "norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738.

Based on its consideration of the history surrounding the ATS, the Court concluded that the ATS "is a jurisdictional statute creating no new causes of action," *id.* at 724, and that its grant of jurisdiction originally enabled federal courts to entertain suits by aliens based on the "handful of international *cum* common law claims understood in 1789 . . . ," *id.* at 712. Those "modest set of actions" consisted of: "offenses against ambassadors, violations of safe conduct . . . and individual actions arising out of prize captures and piracy . . . . " *Id.* at 720 (citation omitted). The Court found "no basis to suspect Congress had any examples in mind beyond those torts . . . . " *Id.* at 724.

A. *Sosa* Restricts ATS Claims to Universally Accepted and Concretely Defined Violations of the Law of Nations.

Although the Court left the door "still ajar" to actions brought under the ATS for violations not cognizable in 1789, it did so "subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Sosa*, 542 U.S. at 729. The Court established a three-part test for recognizing such new claims. The stringency of that test cannot be overstated. "[C]ourts should require any claim based on the present-day law of nations to rest on a norm of [i] international character [ii] accepted by the civilized world and [iii] defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. Conversely, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732.

The Court instructed federal courts to exercise "caution" when considering whether to create a new cause of action, and it provided five reasons for that caution:

> *First*, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms . . . .
>
> *Second*, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of

the role of the federal courts in making it . . . . [T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.

Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases . . . . [T]he possible collateral consequences of making international rules privately actionable argue for judicial caution.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits . . . .

The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern

> indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.

Id. at 725-28 (citations omitted).

B. *Sosa* Requires Courts to Determine Whether the Specific Acts of Defendants Violate Definite Norms Accepted Among Civilized Nations, Not Whether Defendants Conspired With, or Aided or Abetted the Violations of, Others.

As the district court stated, "Plaintiffs' claims are essentially claims for secondary liability, *i.e.*, claims that Defendants 'facilitated,' 'conspired with,' 'participated in,' 'aided and abetted,' or 'cooperated with,' government actors or government activity in violation of international law." (JA 0011.) However, the court then asked and answered the wrong question: whether "following *Sosa*, private individuals can be held liable under the ATS for aiding and abetting violations of international law." (JA 0011-12.) *Sosa* does not suggest that courts may first ask whether someone other than the defendant committed a violation of the law of nations, and then ask whether, as a general matter, the law of nations recognizes aiding and abetting or conspiratorial liability.

To the contrary, *Sosa* requires that, as part of "the determination whether a norm is sufficiently definite to support a cause of action," one considers:

> whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a

> private actor such as a corporation or individual. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), *with Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

542 U.S. 732 & n.20; *see also id.* at 760 ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.") (Breyer, J., concurring).

In *Sosa*, the Court evaluated the specific conduct of Alvarez—his abduction and one-day detention of Sosa—against international norms, and concluded that Alvarez's conduct was not proscribed by any well-defined and uniformly accepted norm under the law of nations. *Id.* at 731-38. Likewise, whenever this Court has considered an ATS claim brought against an individual, it has measured the alleged (or proven) conduct of that individual against defined international norms. For example, in *Filartiga*, this Court examined the conduct of Pena—a Paraguayan government official who personally tortured Filartiga—against international norms concerning torture. 630 F.2d at 878, 880-85. In *Kadic*, the defendant, Karadzic, "in his capacity as President . . . [directed] a pattern of systematic human rights violations"; this Court measured Karadzic's own conduct against the law of nations. 70 F.3d at 237, 241-45.

Here, the district court did not examine each of the acts allegedly committed by the Shell Parties and ask whether those acts violated an international norm with at least as "definite content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. Instead, the district court concluded that the Kiobel Plaintiffs had sufficiently pleaded that the Nigerian government had violated the law of nations, and although it was a "close question," concluded that a general international rule of aiding and abetting, or conspiratorial, liability existed. (JA 0011-12, 0015-20.)

That approach is forbidden by *Sosa* and this Court's precedents. It also conflicts with *Sosa*'s instruction that the courts exercise "great caution in adapting the law of nations to private rights." 542 U.S. at 728. Blanket recognition of private liability for aiding and abetting or conspiracy would render all those who do business in foreign countries liable for the acts of those governments, so long as a plaintiff alleged some cooperation between the government and a private defendant. Far from confining the ATS liability to the circumstance of *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), in which the Supreme Court concluded that piracy was sufficiently well-defined and universally accepted in international law to permit the execution of a pirate, *see Sosa*, 542 U.S. at 732, recognition of a general international norm of aiding and abetting, or conspiratorial, liability for private persons would extend the pirate's liability to his financiers, his munitions suppliers, the boat builder, and perhaps even those who advised him of weather conditions.

Indeed, as to the paradigmatic case of piracy, the law of nations condemned the pirate only, not his accessories or abettors. Therefore, England enacted two statutes to extend criminal liability for piracy to certain forms of secondary conduct:

> As, by statute 11 & 12 W.III. c.7 . . . any ship, boat, ordinance, ammunition or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts . . . shall, for each of these offenses, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal or accessory. By the statue 8 Geo. I. c.24 the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any way consulting, combining, confederating, or corresponding with them . . . shall be deemed piracy: and all accessories to piracy, are declared to be principal pirates, and felons without benefit of clergy . . . .
>
> These are the principal case, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; inflicting an adequate punishment upon offenses against the universal law, committed by private persons.

4 William Blackstone, *Commentaries on the Laws of England* 72 (1769). Likewise, in 1790 the United States passed domestic legislation providing criminal liability for those who aided or abetted piracy. *See* Act of April 30, 1790, ch. 9, § 10, 1 Stat. 114 (1790) (one who did "knowingly and wittingly aid" piracy was deemed an "accessory to such piracies").

Thus, even for piracy, Parliament and Congress—not the courts—determined whether and to what extent to proscribe criminal secondary liability. That history squares with *Sosa*'s repeated admonitions that any such extension of liability: "argue[s] for judicial caution"; "is one better left to legislative judgment"; must be subjected to a "high bar" to avoid "impinging on the discretion of the Legislative and Executive Branches"; and must take into account that Congress has "not affirmatively encouraged greater judicial creativity." *Sosa*, 542 U.S. at 725, 727, 728.

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF THE KIOBEL PLAINTIFFS' EXTRAJUDICIAL KILLING CLAIM.

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations.

Of the twelve plaintiffs, only one, Esther Kiobel, purportedly "on her own behalf and on behalf of her late husband, Dr. Barinem Kiobel,"[7] has brought a claim for extrajudicial killing. (JA 0119-20, ¶ 6(a).) The Amended Complaint alleges that Dr. Kiobel was "convicted of murder and executed by the Nigerian government on November 10, 1995." (JA 0119, ¶ 6(b).)

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[7] Mrs. Kiobel affirmatively pleads that she is *not* the executor of her late husband's estate. (JA 0120, ¶ 6(d).) Thus, she lacks standing to bring the extrajudicial killing claim on behalf of her husband. To the extent she seeks to bring it on her own behalf, *e.g.*, for loss of consortium, there is absolutely no customary international law suggesting that such a tort is cognizable under the law of nations. Mrs. Kiobel also alleges that she herself was beaten and detained by the Nigerian military, but those allegations do not pertain to the extrajudicial killing claim.

It does not allege that the Shell Parties (or SPDC) tried or executed Dr. Kiobel. Instead, the specific acts alleged in the Amended Complaint concerning the Shell Parties' relationship to Dr. Kiobel's execution are: (a) Alhaji M. Kobani, allegedly an agent of the Shell Parties and SPDC, "bribed witnesses to give false testimony;" (b) the Shell Parties and SPDC "participated in various witness preparation sessions in which witnesses were instructed on what to say;" (c) the Shell Parties and SPDC "participated in a reception for the witnesses shortly before trial;" and (d) "[a]n official SPDC representative attended the trial." (JA 0139, ¶ 70.)

No definite and uniformly agreed-upon norm of the law of nations prohibits any of these alleged acts. Although bribery of witnesses is illegal in many countries, it is not a concern of the law of nations. As this Court held in *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975):

> The reference to the law of nations must be narrowly read if the [Alien Tort Statute] is to be kept within the confines of Article III. We cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."

Id. at 1015; *see also Flores*, 414 F.3d at 249 ("Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law .... Therefore, for example, murder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable under the [ATS] as a violation of customary international law because the 'nations of the world' have not demonstrated that this wrong is 'of mutual, and not merely several, concern'") (quoting *Filartiga*, 630 F.2d at 888). The Kiobel Plaintiffs have never even suggested, much less supported, the proposition that the alleged bribery is a violation of the law of nations. A fortiori, participation in witness preparation sessions, hosting receptions and trial observation do not rise to the level of violations of the law of nations, and most often do not even violate domestic law.

The Kiobel Plaintiffs' opening brief entirely misses the mark. The issue is not whether Major Okuntimo or members of the Special Tribunal could be held liable for extrajudicial killing. An action against those defendants, had it been brought, would follow the formula of *Filartiga*, *Kadic*, and several other decisions from other courts of appeals permitting extrajudicial killing claims to proceed against the actual killer. The question here is whether the alleged bribery of witnesses or hosting of a reception by someone who is not the killer (or torturer) rises to the level of a violation of the law of nations. It does not.

The Kiobel Plaintiffs will likely argue that the host of unfounded allegations concerning, *inter alia*, environmental damage, rape and murder by Nigerian

police, and suppression of peaceful protests, are relevant to demonstrate the Shell Parties' responsibility under the law of nations for Dr. Kiobel's execution. However, those allegations, even if proved, would not establish any extrajudicial killing by the Shell Parties. For example, the Kiobel Plaintiffs allege: "the Federal Republic of Nigeria was ruled by a succession of corrupt and brutal military dictatorships," (JA 0128, ¶ 28); "the Government gave Shell a green light to conduct its activities as if the Ogoni did not exist," (JA 0129, ¶ 32); "[t]he Government permitted, and Shell and SPDC accepted, a near total absence of environmental controls," (JA 0130, ¶ 33); "the local population began to express their displeasure in an increasingly public and organized manner," (JA 0131, ¶ 37); "SPDC claimed that there would be an attack on . . . its camp site at Umuechem and requested that the Rivers State Commissioner of Police provide the Mobile Police Force for security protection," (JA 0131, ¶ 39); "acting on SPDC's request, the Mobile Police Force carried out massive scorched earth operations . . . resulting in the massacre of 80 villagers and the destruction of over 495 houses," (JA 0131, ¶ 41).

Those allegations amount to the claim that the Shell Parties knew that they were doing business with a "corrupt and brutal" government, sought police protection from that government, and continued to do business in Nigeria (although not in Ogoniland) even after the Nigerian police massacred civilians, which led to further protests, further violent suppression by the government, and eventually the summary execution of Dr. Kiobel. The proposition that the Kiobel Plaintiffs would like to establish, as a norm of customary

international law, is that someone who conducts business with a brutal government is responsible for that government's actions, at least insofar as those actions protect the government's shared commercial interest with the private party. There is no such norm. All the "evidence" of customary international law concerning extrajudicial killing to which the Kiobel Plaintiff's point would hold the killer liable; none of it suggests that the law of nations prohibits companies from doing business in countries governed by "corrupt and brutal" governments, or would hold them liable for the acts of those governments.[8]

In the district court, the Kiobel Plaintiffs relied on decisions from international criminal tribunals, arguing that because those tribunals imposed criminal

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[8] Whether companies should be forbidden from dealing with brutal or corrupt foreign governments is peculiarly the province of the Executive and Legislative branches of government. *See, e.g.*, U.S. Const. art. I, § 8 (Congressional power to regulate commerce with foreign nations); U.S. Const. art. II, § 2 (Presidential power to make treaties); § 307 of the Tariff Act of 1930, 19 U.S.C. § 1307 (2000) (prohibiting importation of goods produced using convict labor); Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986) (imposing an embargo against Libya); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 207, 100 Stat. 1086 (1986) (repealed) (mandating human rights code of conduct for U.S. entities employing 25 or more people in South Africa); Cuban Assets Control Regulations, 31 C.F.R. Part 515 (prohibiting trade with Cuba); The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6082 (1996) (creating private cause of action against foreign companies who traffic in property that was owned by a United States national and confiscated by the Republic of Cuba). *Sosa*'s concern that the judiciary not permit expansion of the ATS to impinge on activities more suited to those branches is particularly powerful here. *See Sosa*, 542 U.S. at 727-28.

liability on secondary violators in some cases, civil secondary liability should be recognized under the law of nations. However, *Sosa* emphasized the differences between criminal and civil procedure as yet another reason "for a restrained conception of the discretion a federal court should exercise in considering a new cause of action" for violation of international law: "[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." 542 U.S. at 725, 727. As the Supreme Court has noted, "[a]iding and abetting is an ancient criminal law doctrine," but in civil actions it "has been at best uncertain in its application." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994). Even under United States law, "the rules for determining aiding and abetting liability are unclear," *id.* at 188; when United States law provides for criminal aiding and abetting liability, "it does not follow that a private civil aiding and abetting cause of action must also exist. We have been quite reluctant to infer a private right of action from a criminal prohibition alone." *Id.* at 190. Thus, the fact that aiding and abetting liability may exist in the criminal context for certain violations of the law of nations does not provide evidence that civil secondary liability exists for those same violations, much less for any others.[9]

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[9] For whatever they are worth, the charters of international criminal tribunals are themselves inconsistent in their treatment of aiding and abetting liability, thus failing *Sosa*'s "definite content" requirement. For example, the Rome Statute of the International Criminal Court ("Rome Statute") defines the *actus*

If there is anything to be learned from the decisions of the international criminal tribunals, which "are not primary sources of customary international law," *Flores*, 414 F.3d at 264, it is that those tribunals reject the general theory of secondary liability advanced here. For example, charges were filed against Karl Rasche, an executive of a large German bank, in the Nuremberg Military Tribunal. *See United States v. von Weizsacker (Ministries Case)*, 14 Trials of War Criminals Before the Nuernberg Military Tribunals 621, 621-22 (Military Tribunal IV A 1949). Mr. Rasche was charged with, *inter alia*, "War Crimes and Crimes against Humanity" by participating in loans to "various SS enterprises which employed slave labor." *Id.* at 622. The Tribunal acquitted Mr. Rasche

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reus as "aid[ing], abet[ting] or otherwise assist[ing]" the commission or attempted commission of the crime. Rome Statute, art. 25(3)(c), 37 I.L.M. 1002, 1016 (1998). The Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") require only that the aider and abettor "assist, encourage or *lend moral support* to the perpetration of a specific crime." *Prosecutor v. Vasiljevic*, Case No. ICTY-98-32-A, Judgment, ¶ 102 (ICTY App. Chamber, Feb. 25, 2004) (emphasis added); *see also Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 126 (ICTR Trial Chamber, Jan. 27, 2000). Likewise, the *mens rea* element has a different requirement: the Rome Statute demands that the conduct be committed "[f]or the purpose of facilitating the commission of such a crime," Rome Statute, art. 25(3)(c), 37 I.L.M. at 1016, whereas the ICTY and ICTR merely require "knowledge that the acts performed by the aider and abettor assist the commission of a specific crime of the principal," *Vasiljevic*, IC-98-32-A, ¶ 102. *See generally* Albin Eser, *Individual Criminal Responsibility, in The Rome Statute of the Int'l Criminal Court: A Commentary* 801 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

on this charge (while convicting him on others), stating:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.

Id. at 622. The Tribunal went on to hold that by doing business with the German government, the defendant "did not thereby become a criminal partner" with the German government. *Id.* at 854-56.

B. The Kiobel Plaintiffs' Extrajudicial Killing Claim Is Defective Because the Shell Parties Are Not State Actors.

Under *Kadic*, "torture and summary execution—when not perpetrated in the course of

genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law." *Kadic*, 70 F.3d at 243; *see Flores*, 414 F.3d at 244. Here, there are no allegations of genocide or war crimes. Although the Amended Complaint barely alleges that the Shell Parties acted under "color of law," the facts pleaded belie that assertion. In allegedly paying bribes for false testimony, participating in witness preparation, hosting a reception for witnesses and attending trial, there is nothing that would constitute state action by the Shell Parties.

The state action requirement arises from the fact that "customary international law addresses only those 'wrong[s]' that are 'of mutual, and not merely several, concern' to States." *Flores*, 414 F.3d at 249 (quoting *Filartiga*, 630 F.2d at 888). Major Okuntimo and the Special Tribunal are state actors.[10] The Shell Parties are not. It is quite clear from this Court's precedents

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[10] Indeed, perusal of the Amicus brief of the International Law Professors (in support of the Kiobel Plaintiffs) is replete with references suggesting that States and their actors are the ones who may be held liable for extrajudicial killing. Brief of Amici Curiae Int'l Law Professors in Support of the Plaintiffs-Appellants, No. 06-4800 (2d Cir. May 15, 2007); *see, e.g., id.* at 5 ("it was the responsibility of a state"); 6 ("acts of German officials against German citizens could be prosecuted"), ("several former judges under the Nazi government [were found] guilty"); 7 ("the human rights obligations undertaken by all U.N. member States"); 12 ("the right to life . . . like the prohibition against torture and other ill-treatment . . . is a rule of general international law binding on all states"), ("the Covenant imposes on states"); 13 ("must be respected by all states"). It is devoid of any suggestion that a private party bribing a witness to testify falsely has violated a well-defined norm of the law of nations.

that if an employee of the Shell Parties had murdered Dr. Kiobel, neither that employee nor the Shell Parties itself could be sued under the ATS (or TVPA) for extrajudicial killing. *See, e.g.*, *Flores*, 414 F.3d at 249. There is no support in the law of nations—much less a clearly defined and universally accepted rule—that would hold the Shell Parties liable for suborning perjury that led to an execution conducted by a state actor.

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Extrajudicial Killing.

A further, and insurmountable, problem for the Kiobel Plaintiffs is that the Shell Parties did not take any of the actions described in the Amended Complaint. The pleading in the Amended Complaint is haphazard, sometimes alleging that the Shell Parties "and/or" SPDC engaged in acts in Nigeria, sometimes alleging that the Shell Parties "and" SPDC engaged in acts in Nigeria, and sometimes alleging that only SPDC engaged in such acts.

SPDC conducts, and has conducted, business in Nigeria, although it has conducted none in Ogoniland since 1993. It is not a party to this appeal; the proceedings against it in the district court are continuing. The Shell Parties, who are the parties to this appeal, have never conducted any business in Nigeria, and have no presence there. Therefore, they cannot have committed any extrajudicial killing in violation of the law of nations. Indeed, the Kiobel Plaintiffs amended their Complaint to delete an allegation that the Shell Parties and Nigerian government had meetings in the Netherlands and

England to develop a concerted plan. *See supra* at 6-7. Because the ATS is jurisdictional and the identity of "the perpetrator being sued" is essential to the determination of whether the law of nations has been violated, *Sosa*, 542 U.S. at 732 n.20, this Court should go beyond the pleadings and rely on the uncontroverted evidence that the Shell Parties are purely investment holding companies with no operations in Nigeria. The federal courts, therefore, lack subject matter jurisdiction over claims that the Shell Parties are responsible for the alleged extrajudicial killing of Dr. Kiobel, because they took no actions whatsoever in Nigeria.

The Kiobel Plaintiffs will likely rely on paragraph 25 of their Complaint, which alleges that "Shell has dominated and controlled SPDC." (JA 0128, ¶ 25.) However, that allegation is conclusory, untrue and irrelevant. The uncontroverted record evidence—reviewable by this Court because it goes to subject matter jurisdiction—is that SPDC is an independent corporation with all the attributes of a separate and distinct legal entity, and is not "dominated and controlled" by the Shell Parties. (*Kiobel* Un-numbered Docket Entry between Nos. 167-168, at 3 (Arbido Decl. 6).) Despite years of discovery, the Kiobel Plaintiffs have no evidence to the contrary.

More importantly, that allegation is irrelevant. The potential liability of the Shell Parties does not turn on allegations that might, if proved, satisfy U.S. domestic veil-piercing law. Again, the question is whether the specific conduct attributed to the Shell Parties constitutes a tort in violation of the law of nations. There is no well-defined, uniformly accepted norm of customary international law that would hold

the Shell Parties liable for the alleged extrajudicial killing of Dr. Kiobel through their "domination" of SPDC's affairs. There is no evidence of the "usage and practice of States—as opposed to judicial decisions or the works of scholars," *Flores*, 414 F.3d at 250, to show the existence of a well-defined norm that would hold the Shell Parties liable for the alleged conduct of SPDC in Nigeria.

Indeed, although there is no competent source of customary international law that would suggest that the Shell Parties, as "dominating" owners of SPDC, could be held liable for extrajudicial killing, even the incompetent evidence suggests that the law of nations does not attach civil liability to corporations under any circumstance. For example, in the criminal context, the Rome Statute and the charters governing the ICTY and ICTR restrict the jurisdiction of those tribunals to "natural persons" only, excluding corporations from their coverage. The Statute of the ICTY, art. 6, 32 I.L.M. at 1194 ("[t]he International Tribunal shall have jurisdiction over *natural persons*") (emphasis added); The Statute of the ICTR, art. 5, 33 I.L.M. at 1604 (same); Rome Statute, art. 25, 37 I.L.M. at 1016 (same). Moreover, the drafters of the Rome Statute explicitly considered and declined to recognize corporate liability. *See* Draft Statute for the International Criminal Court, art. 23, at 5-6 & n.3, U.N. Doc. A/Conf. 183/2/Add.1 (1998) (noting proposal); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, at 133-36, ¶¶ 32-66, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998) (recording debate on proposal); *id.* 275, ¶ 10 (noting deletion of corporate liability); *see also* Kai Ambos,

Article 25: Individual criminal responsibility, *in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 478 (Otto Triffterer ed., 1999) (Rome conference omitted corporate liability because, even among domestic laws "there are not yet universally recognized common standards for corporate liability").

As to civil liability, the Rome Statute requires that individuals (not corporations, which cannot be held criminally liable) cannot be held civilly liable unless they have first been held criminally liable, Rome Statute, art. 75, 37 I.L.M. at 1045-46, under the proof "beyond [a] reasonable doubt" standard, *id.*, art. 66(3), 37 I.L.M. at 1040. Thus, the Rome Statute bars civil liability for natural persons under a "preponderance of the evidence" standard. From this, it would be impossible to conclude that corporations can be held liable for extrajudicial killing under a "preponderance of the evidence" standard, which is what the Kiobel Plaintiffs advocate. Similarly, when Congress enacted the TVPA, it excluded the possibility of corporate liability for extrajudicial killing (and torture). *See* § II.D *infra*.

D. The Kiobel Plaintiffs' Extrajudicial Killing Claim Does Not Survive the TVPA.

The Kiobel Plaintiffs have not sued the Shell Parties under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, ("TVPA"), and cannot do so because corporations cannot be liable under the TVPA. Only an "individual" may be sued under the statute. *See* 28 U.S.C. § 1350 note Sec. 2(a) ("An *individual* who . . . subjects an individual to torture

shall . . . be liable for damages to that individual") (emphasis added). Congress "use[d] the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: *only individuals may be sued.*" S. Rep. No. 102-249, at 7 (1991) (emphasis added). *See, e.g., Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004) (defendant, being a corporation, could not be sued under the TVPA).

Claims for extrajudicial killing (and torture) under the ATS do not survive the adoption of the TVPA. As *Sosa* explains: "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ." 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *see also Filartiga*, 630 F.2d at 880 (same). This Court recently explained more fully that if a treaty or domestic law addresses the issue, no resort to customary international law is available:

> [T]he [*Sosa*] Court cautioned that resort to customary international law is appropriate only "where there is no treaty and no controlling executive or legislative act or judicial decision" that speaks to the issue in dispute. In *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003), this court traced the long lineage of this limiting principle, beginning with *The Nereide*, in which Chief Justice Marshall wrote that while courts are "bound by the law of nations which is a part of the law of the land," Congress may apply a different rule by passing an act for the purpose." *Yousef* itself stated that, "[i]f a statute makes plain Congress's intent . . . , then Article III courts . . .

> must enforce the intent of Congress irrespective of whether the statute conforms to customary international law."

Olivia v. United States Dep't of Justice, 433 F.3d 229, 233 (2d Cir. 2005) (citation omitted).

The TVPA, adopted in 1991, is a "controlling legislative act." Accordingly, no claim for extrajudicial killing remains by way of the ATS's reference to the law of nations, because reference to the law of nations is a last resort, available only when no treaty or controlling legislative act exists.[11]

The Court of Appeals for the Seventh Circuit addressed this question in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005). *Enahoro* holds that the TVPA "occup[ies] the field . . . [i]f it did not, it would be meaningless [because] [n]o one would plead a cause of action under the [TVPA] and subject himself to its

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[11] *Smith*, 18 U.S. (5 Wheat.) 153, to which *Sosa* points for elaboration of the specificity and universality with which torts against the law of nations must be defined and accepted, *Sosa*, 542 U.S. at 732, is somewhat instructive on this point. Although the Supreme Court in *Smith* concluded that the customary international law against piracy had been specifically defined and widely accepted for centuries, Smith was not prosecuted under customary international law via the Alien Tort Statute. *Smith*, 18 U.S. (5 Wheat.) at 161-63. Instead, Congress had, on March 3, 1819, passed a statute punishing "piracy, as defined by the law of nations" with death. *Id.* at 157. Smith was prosecuted under that controlling federal statute, not under customary international law. *Id.*

requirements if he could simply plead under international law."[12] *Id.* at 884-85.[13]

In the district court, the Kiobel Plaintiffs asserted that *Enahoro* conflicts with *Flores* and *Kadic*.[14] However, neither *Kadic* nor *Flores* reached the question of whether an ATS-based claim for extrajudicial killing (or torture) survived the TVPA's adoption. In *Flores*, the plaintiffs asserted environmental torts in violation of the "right to life," "right to health" and right to "sustainable development." *Id.* at 237. The TVPA concerns torture and extrajudicial killing only, so as to whatever other torts in violation of the law of nations were actionable under the ATS before the TVPA, those remain unaffected by the TVPA's adoption. *See* H.R. Rep. No. 102-367 (I), at 4 (1991), *as reprinted in*

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[12] The TVPA requires courts to "decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id.* § 2(b).

[13] *But see Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005). *Aldana* permitted the plaintiff simultaneously to proceed with torture claims under the ATS and TVPA. 416 F.3d at 1250-51. However, *Aldana* made the fatal error of concluding that *Sosa* held that the ATS provided a cause of action, and was not merely a jurisdictional grant. *Id.* at 1246 & n.4. It then relied on its own precedents concerning implied Congressional repeals of prior legislation, *id.* at 1251, instead of relying on *The Paquete Habana*'s holding, followed by this Court on several occasions, that customary international law is displaced by treaty or legislative action.

[14] The Court of Appeals for the Seventh Circuit very carefully explained why its decision in *Enahoro* did not conflict with this Court's decisions in *Kadic* or *Flores*. *See Enahoro*, 408 F.3d at 885 n.2.

1992 U.S.C.C.A.N. 84, 87 ("[C]laims based on torture and summary executions do not exhaust the list of actions that may be appropriately covered [by the ATS]. That statute should remain intact to permit suits based on *other norms* that already exist or may ripen in the future into rules of customary international law.") (emphasis added).

Kadic is entirely consistent with *Enahoro*. In *Kadic*, the defendant, Karadzic, argued "that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act." 70 F.3d at 241. Karadzic argued that the TVPA's state action requirement should be grafted onto *all* ATS claims—not just those covered by the TVPA. *Id.* This Court rejected that argument, noting that "Congress indicated that the Alien Tort Act 'has other important uses and should not be replaced,'" citing the portion of the House Report quoted immediately above. *Id.* Further, this Court held that, unless committed "in the course of genocide or war crimes," claims for summary execution and torture "are proscribed by international law only when committed by state officials or under color of law." *Id.* at 243. Thus, it is clear that Karadzic's argument, rejected by this Court, is that the TVPA's state action requirement should be grafted onto *all* ATS claims. As to claims for extrajudicial killing and torture, the TVPA's state action requirement was merely a codification of customary international law. This Court's statement that the "scope of the Alien Tort Act remains undiminished by the enactment of the Torture Victim Act," *id.* at 241, in context, means simply that the TVPA did not affect ATS claims other than those involving extrajudicial killing or torture, and as to

those claims, the state action requirement was unchanged by the TVPA.

Finally, the Kiobel Plaintiffs' position would produce an unfathomable result. If ATS-based claims for extrajudicial killing and torture survive the TVPA, United States citizens who are victims of torture or extrajudicial killing by foreign nationals in a foreign country must first exhaust the legal systems of other countries before seeking relief from their own courts, but aliens tortured by aliens in foreign countries may seek immediate redress in the courts of the United States. "It is hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed." *Enahoro*, 408 F.3d at 886. It would be even harder to imagine the interpretation the Kiobel Plaintiffs propose.

III. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' TORTURE/CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIM.

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations.

The Amended Complaint contains many allegations that the Kiobel Plaintiffs were beaten and abused by the Nigerian military. (*See, e.g.*, JA 0119-26, ¶¶ 6-17.) The Amended Complaint does not, however, contain any allegation that the Shell Parties (or even SPDC) conducted any of those beatings or directly caused any injury to the Kiobel Plaintiffs.

Moreover, although the allegations contain many specific dates on which particular beatings or injuries occurred, they do not suggest that any representative of the Shell Parties: (a) was present; (b) requested or encouraged the particular beating or injury; or even (c) knew that the alleged beating had occurred.

For example, the Amended Complaint alleges that plaintiff John-Miller was beaten on October 28, 1995, when he arrived for a meeting "with Government officials in an effort to negotiate a peaceful resolution of Ogoni grievances relating to the impact of oil exploration." (JA 0120, ¶ 7.) However, there is no suggestion that the Shell Parties had anything to do with the meeting, much less the alleged beating of plaintiff John-Miller when he arrived. Similarly, as to plaintiff Nwidor, the Amended Complaint alleges that "Shell viewed him as an enemy. On May 25, 1994, [Rivers State Internal Security Task Force ("ISTF")] troops arrested him . . . . Nwidor was brutally beaten on the spot with a 'koboko' whip." (JA 0122, ¶ 9.) The Amended Complaint further alleges that "Major Okuntimo [of the ISTF] visited the cell daily and threatened to kill [Nwidor] for not allowing Shell to resume operations in Ogoniland." (JA 0122, ¶ 9.) However, there is no allegation that the Shell Parties participated in or requested Nwidor's alleged beating and confinement; there is not even an allegation that they knew of it.

These allegations, and the balance like them, are insufficient to allege that the Shell Parties violated any definite and universally recognized proscription of the law of nations sufficient to meet *Sosa*'s standard. The question of whether certain Nigerian military officials could be prosecuted for torture is not the issue here.

Just as with the extrajudicial killing claim, *see* § II.A *supra*, the Kiobel Plaintiffs' claim for torture and cruel, inhuman and degrading treatment fails, because, even if the Nigerian military violated customary international law, the Shell Parties did not.[15]

The Amended Complaint does contain allegations about the relationship between SPDC or the Shell Parties and the Nigerian government. Putting aside the purely conclusory allegations, those allegations are as follows:

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[15] Putting torture aside, cruel, inhuman and degrading treatment does not meet *Sosa*'s standard requiring a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." 542 U.S. at 725. In the district court, the Kiobel Plaintiffs rested their claim for cruel, inhuman and degrading treatment (as distinct from torture) on judicial decisions from the European Court of Human Rights ("ECHR"). However, the ECHR is not "empowered to create binding norms of customary international law." *Flores*, 414 F.3d at 263-64. "[T]he [ECHR] is only empowered to 'interpret[]' and 'apply' the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5—an instrument applicable only to its regional States parties—not to create new rules of customary international law." *Id.* Under *Sosa*, those judicial decisions have "little utility" and cannot prove the existence of a norm of customary international law. *See Sosa*, 542 U.S. at 734. The only federal appellate court to address this issue after *Sosa* held that a claim for cruel, inhuman and degrading treatment "has no basis in law." *Aldana*, 416 F.3d at 1247; *see Flores*, 414 F.3d at 252 ("customs or practices based on social and moral norms, rather than international legal obligation, are not appropriate sources of customary international law").

(1) "Shell and SPDC financially supported the operations of these military units directly and indirectly, including the purchase of ammunition for the Police" (JA 0118, ¶ 2);

(2) "Shell personnel called in government troops" to respond to a protest (JA 0125, ¶ 14);

(3) "Shell and SPDC's close relationships with the Nigerian government and the local Rivers State government were strengthened by their 'revolving door' employment policy" (JA 0130, ¶ 34);

(4) When MOSOP demanded that SPDC pay royalties to the Ogoni people, "SPDC's officials convened meetings with the Governor of Rivers State and representatives of the Nigerian Police, Nigerian Army, Nigerian Navy and State Security Services" (JA 0132, ¶ 43);

(5) "Shell and SPDC knew, or were reckless in not knowing, that the pipeline construction would involve the bulldozing of crops and farmlands under supervision of Government armed forces" (JA 0133, ¶ 46);

(6) "Rather than disassociating itself with the chronically brutal actions of the Nigerian military, SPDC's divisional manager wrote to the Governor of Rivers State, a former SPDC employee, requesting 'the usual assistance' to allow further work on the pipeline to continue" (JA 0133, ¶ 47);

(7) "SPDC Managing Director Philip B. Watts, with the approval of Shell, requested the Nigerian Police Inspector General to increase SPDC's

> security including the immediate deployment of a new 1,200 man police force, known as the Oil Production Area Police Command, to deter and quell community disturbances. In exchange, Shell and SPDC promised to provide complete logistical and welfare support to the Nigerian forces, including salary, housing, uniforms, automatic weapons, riot gear and vehicles" (JA 0134, ¶ 51);
>
> (8) "Shell and SPDC provided logistical and financial support for the operations of the ISTF, including transportation, food and ammunition despite its engagement in repeated acts of murder, torture, rape, cruel, inhuman and degrading treatment, crimes against humanity and property destruction. Shell and SPDC's financial support included cash to support ISTF operations and bribes to its commander" (JA 0135, ¶ 54);
>
> (9) "SPDC officials frequently visited the ISTF detention facility at AFAM and regularly provided food and logistical support for the soldiers" (JA 0138, ¶ 64).

Even were those allegations true, which they are not, they would not establish that the Shell Parties violated any well-defined and uniformly recognized norm of customary international law. There is no such norm holding a corporation liable for torture conducted by a foreign government's police or military because the corporation: requests police protection; pays for that protection; provides information to the police or military; employs former military or police personnel; purchases equipment for the police or military; or visits detention facilities. As with the extrajudicial killing claim, see § II.A supra, the law of nations does not

contain any well-defined rule that a private business that requests assistance from and contributes money to a foreign nation's police or military is liable for torture or cruel and inhuman acts committed by the police or military.

B. The Kiobel Plaintiffs' Torture/Cruel, Inhuman and Degrading Treatment Claim Is Defective Because the Shell Parties Are Not State Actors.

"[W]hen not perpetrated in the course of genocide or war crimes," torture, like summary execution, violates the law of nations "only when committed by state officials or under color of law." *Kadic*, 70 F.3d at 243. The allegations of the Amended Complaint concerning the actions of the Shell Parties do not, and could not, suggest that the Shell Parties are state actors. For the reasons set forth in Section II.B *supra*, this claim cannot proceed against the Shell Parties because they are not state actors.

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for Torture or Cruel, Inhuman and Degrading Treatment.

Several of the acts allegedly taken to assist or aid the Nigerian government in its torture or inhumane treatment of the Kiobel Plaintiffs are acts alleged as to SPDC only. SPDC is not a party to this appeal, nor was it the subject of the order underlying this appeal. Consequently, acts alleged as to SPDC, such as the request to create a new police force, (JA 0134, ¶ 51), or the visits to the detention facilities, (JA 0138, ¶ 64), are not the conduct of the Shell Parties, and are

therefore immaterial to the viability of any claim against them.

As to the balance of the allegations, although they are of the form "Shell and SPDC" took some action, as explained in Section II.C, there is no evidence whatsoever that the Shell Parties took any action in Nigeria; the uncontroverted evidence is that the Shell Parties are investment holding companies that have no oil production operations in Nigeria or anywhere in the world, and have no presence in Nigeria whatsoever. Furthermore, as explained in Section II.C *supra* in connection with the extrajudicial killing claim, there is no settled norm of customary international law that would render a corporation civilly liable for torture or cruel, inhuman and degrading treatment, much less for acts allegedly committed by its wholly-owned subsidiary.

D. The Kiobel Plaintiffs' Torture/Cruel, Inhuman and Degrading Treatment Claim Does Not Survive the TVPA.

As its name indicates, the Torture Victims Protection Act provides a statutory remedy for victims of torture, not just summary execution. For the same reasons the Kiobel Plaintiffs' extrajudicial killing claim does not survive the TVPA, the Kiobel Plaintiffs' torture claims do not survive the TVPA. *See* Section II.D *supra*.

In addition, the TVPA precludes recognition of a separate cause of action based on cruel, inhuman and degrading treatment. The TVPA was enacted to "carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment." S. Rep. No. 102-249, at 3 (1991). In implementing the Convention, Congress decided to make enforceable the Convention's norms proscribing torture and extrajudicial killing only—not those concerning cruel, inhuman and degrading treatment. *See* 28 U.S.C. § 1350 note, § 2(a). A judicial decision to expand the reach of the ATS to areas Congress considered and rejected would run afoul of *Sosa*'s several cautions.

IV. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' CRIMES AGAINST HUMANITY CLAIM.

A. The Amended Complaint Does Not State a Tort in Violation of the Law of Nations.

The Kiobel Plaintiffs' allegation that the Shell Parties committed "crimes against humanity" merely recapitulates their claims for extrajudicial killing, torture and cruel, inhuman and degrading treatment, with the added claim that those acts were committed as part of an allegedly "systematic assault against an identifiable population group." (*See* JA 0145, ¶ 93.) As explained *supra* at 3, 5-6, the Kiobel Plaintiffs do not allege that the Shell Parties committed any of those acts of killing, torture, or cruel, inhuman and degrading treatment, and there is no well-defined norm of customary international law that would proscribe any of the conduct the Shell Parties (or SPDC) allegedly committed. Thus, for the same reasons the Kiobel Plaintiffs cannot maintain Counts I and III, they cannot maintain Count II.

B. "Crimes Against Humanity" Does Not Meet *Sosa*'s Requirement of "Definite Content."

As a separate matter, "crimes against humanity" lacks well-defined content under international law. "Crimes against humanity" is a broad, descriptive genus of criminal offenses susceptible to competing definitions of varying scope, and its meaning cannot be delimited with a specificity comparable to that of the 18th-century paradigms of violation of safe conducts, infringement of the rights of ambassadors, or piracy, as required to be actionable post-*Sosa*.

"'[C]rimes against humanity' is far from having the benefit of international and national legislation which provides it with the *necessary legal specificity and particularity* which exists in common crimes." M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* xvii (2d rev. ed., Kluwer Law Int'l, 1999) (emphasis added); *see also* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 Transnat'l L. & Contemp. Probs. 199, 212 (1998) ("crimes against humanity" presents "a mixed baggage of certainty as to some of its elements, and uncertainty as to others and to their applicability to non-state actors"); Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 Am. J. Int'l L. 43, 44 (1999) ("*The evolution of the concept of crimes against humanity in customary international law has not been orderly.* A definition was first articulated in the Nuremberg Charter in 1945; but whether this was a legislative act creating a new crime or whether it simply articulated a crime already embedded in the fabric of customary

international law remains controversial.") (emphasis added); Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 Brook. J. Int'l L. 327, 352 (1995) (definition of "crimes against humanity" is "unclear"). Notably, "crimes against humanity" does not even appear in the list of violations of customary international law in the Restatement (Third) of the Foreign Relations Law of the United States § 702 (1986), entitled "Customary International Law of Human Rights."

In the district court, the Kiobel Plaintiffs relied on the decisions of international tribunals such as the Nuremberg Military Tribunals and the International Criminal Tribunal for the Former Yugoslavia as sources of evidence of customary norms of international law. Although the decisions of those tribunals are not competent sources of customary international law, *see Flores*, 414 F.3d at 263-64, their charters evidence the lack of agreement on the definition of "crimes against humanity." For example, the statute of the ICTY requires that the enumerated acts constituting "crimes against humanity" be "committed in armed conflict," but the Rome Statute does not. *Compare* The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94 *with* Rome Statute, art. 7, 37 I.L.M. at 1004-05. Similarly, the statute of the ICTR requires that enumerated acts be carried out with discriminatory motive, but the Rome Statute does not.[16] *Compare* The Statute of the ICTR, art. 3, 33

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[16] The Kiobel Plaintiffs do not plead any discriminatory motive on the part of the Shell Parties; the Amended Complaint suggests no motive other than financial profit.

I.L.M. at 1603 *with* Rome Statute, art. 7, ¶ 1, 37 I.L.M. at 1004. There has also been considerable disagreement as to whether an act must be committed as part of an attack against a civilian population that is "widespread" and/or "systematic" to qualify as a crime against humanity. The statute of the ICTR requires an enumerated act to be "committed as part of a *widespread or systematic* attack against any civilian population," but the statute of the ICTY contains no such requirement. *Compare* The Statute of the ICTR, art. 3, 33 I.L.M. at 1603 *with* The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94. Unlike the ICTR and ICTY Statutes, the Rome Statute defines "crimes against humanity" to include the "[e]nforced disappearance of persons" and "the crime of apartheid" in addition to the catch-all category "[o]ther inhumane acts," which all three of these statutes contain. *Compare* Rome Statute, art. 7, 37 I.L.M. at 1004-05 *with* The Statute of the ICTR, art 3, 33 I.L.M. at 1603 and The Statute of the ICTY, art. 5, 32 I.L.M. at 1193-94.

Thus, quite apart from the fact that there exists no well-established norm of the law of nations that prohibits, as "crimes against humanity", any of the conduct allegedly committed by the Shell Parties, "crimes against humanity" lacks the "definite content" required by *Sosa*.

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Crimes Against Humanity.

The law of nations contains no well-defined proscription holding corporations liable for crimes against humanity by virtue of actions taken by their

wholly owned subsidiaries. Therefore, for the same reasons set forth in Sections II.C and III.C *supra*, the Kiobel Plaintiffs have failed to state a claim for crimes against humanity against the Shell Parties.

V. THIS COURT SHOULD ORDER THE DISMISSAL OF THE KIOBEL PLAINTIFFS' ARBITRARY ARREST AND DETENTION CLAIM.

A. The Amended Complaint Does Not State a Claim in Violation of the Law of Nations.

Ten of the Kiobel Plaintiffs have brought claims for unlawful arrest and detention. (JA 0146.) None of them alleges that the Shell Parties arrested or detained them. The only allegation concerning the Shell Parties' participation in any arrest or detention concerns plaintiff Idigma, who alleges:

> During his incarceration at Kpor, he was brought into a room with a Shell executive who was asked to identify Plaintiff Idigma as one of the Ogoni who had prevented Shell from working in Ogoniland. Plaintiff Idigma avoided execution only because the Shell executive could not positively identify him.

(JA 0126, ¶ 15.) Surely, there is no norm of international law that would hold the Shell Parties liable for Mr. Idigma's arrest and detention when the only allegation is that a "Shell executive" refused to identify Mr. Idigma.

As with the Kiobel Plaintiffs' other claims, *see* §§ II.A and III.A *supra*, there is no well-defined international norm that would hold the Shell Parties liable for the arbitrary arrests and detentions allegedly committed by the Nigerian army or police forces. Even if the Shell Parties provided food, ammunition, supplies and information to the Nigerian army and police, and even if the Shell Parties requested the police to quell protests, there is no well-defined standard of customary international law that would hold the Shell Parties liable for the Nigerian government's arrests and detentions of the Kiobel Plaintiffs.

B. "Arbitrary Arrest and Detention" Is Not Well-Defined Under the Law of Nations.

In *Sosa*, the Court rejected Alvarez's claim that customary international law concretely defined a claim for arbitrary arrest and detention. 542 U.S. at 738. Alvarez relied on "two well-known international agreements that, despite their moral authority, have little utility under the standard set out" by the Court: the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"). *Sosa*, 542 U.S. at 734. The Kiobel Plaintiffs have not proffered a more specific or concrete definition of "arbitrary arrest and detention" than the definition rejected by the Supreme Court in *Sosa*, nor did the district court provide such a definition in denying the motion to dismiss this Count. The cause of action as defined falls well short of the level of specificity required by *Sosa*.

Sosa noted that the Restatement (Third) of the Foreign Relations Law of the United States states that

a "*state* violates international law if, as a matter of *state policy*, it practices, encourages, or condones . . . *prolonged* arbitrary detention." 542 U.S. at 737 (emphasis added) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 702). Here, the Kiobel Plaintiffs have not pleaded the existence of a "state policy" or referred to any settled definition of "prolonged" arbitrary detention.[17] The district court appeared to accept that these were indeed required elements of a claim actionable under the ATS. (*See* JA 0018.) However, the district court

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[17] The allegations pleaded as to those plaintiffs asserting claims for arbitrary arrest and detention do not suggest any coherent standard. Dr. Kiobel was allegedly charged with murder and detained in connection with that charge. (JA 0119, ¶ 6(b).) John-Miller was allegedly detained for a month for allowing his church to be used for MOSOP meetings. (JA 0120, ¶ 7.) Wiwa was detained "for five days," "formally charged before the Magistrate Court . . . with unlawful assembly," and released on bail. (JA 0121, ¶ 8.) Nwidor was detained for an unspecified period of time and then "released after his family paid bribes." (JA 0122, ¶ 9.) Nwikpo "was detained for 9 hours." (JA 0122-23, ¶ 10.) Kote-Witah was detained for an unspecified time and escaped. (JA 0123, ¶ 11.) Wifa was detained for an unspecified time and released. (JA 0124, ¶ 12.) Kunenu was detained for an unspecified time and released. (JA 0124, ¶ 13.) Idigima was detained for eight weeks, and is the plaintiff whom a "Shell executive" did not identify as involved in "prevent[ing] Shell from working in Ogoniland." (JA 0125-26, ¶ 15.) Tusima was not detained, but alleges that his father was detained for approximately 15 months; however, he does not allege that he is the executor of his father's estate. (JA 0126-27, ¶ 17.) The extraordinary variety of these allegations strongly suggests that the Kiobel Plaintiffs do not themselves even have in mind any well-settled definition of "arbitrary arrest and detention," much less that one exists under the law of nations.

did not then apply those requirements to the individual allegations in the Amended Complaint.

The district court made no attempt to determine whether any alleged conduct of the Shell Parties as to any particular arrest or detention violated a well-settled norm of the law of nations. Indeed, the district court made no effort to determine whether there exists any well-settled definition, under customary international law, of what constitutes a "prolonged" detention or an "arbitrary" arrest. Instead, the district court simply stated that "a number of Plaintiffs plead arbitrary detention in excess of *one day*, and at least three plead detention of four weeks or more," and then concluded that such detentions might qualify for a "state policy of prolonged arbitrary detention." (*Id.* (emphasis added).) However, the district court provided no basis for its assessment that anything over a day, or even four weeks, is considered a "prolonged detention" under well-defined standards of customary international law, (*id.*), much less that any alleged conduct of the Shell Parties would violate such a norm if proved. The fact that the *Sosa* Court found that a detention of *less* than a day did *not* violate a norm of customary international law so well defined as to support the creation of a federal remedy certainly does not imply the converse—*i.e.*, that detentions of more than a day *do* violate such norms. *See* 542 U.S. at 738.

Sosa itself suggests that no well-defined standard exists: "it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses." *Id.* at 737; *see also id.* at 734-37 & n.27 (rejecting, as insufficient to show a clearly-defined standard for arbitrary arrest and

detention: the UDHR; the ICCPR; Bassiouni's survey of national constitutions; a decision by the International Court of Justice and several federal court decisions.) In the absence of a well-defined common understanding of "arbitrary arrest and detention," that claim cannot provide a basis for the invocation of jurisdiction under the ATS.

C. The Shell Parties' Ownership of SPDC Does Not Render Them Liable for the Tort of Arbitrary Arrest and Detention.

As explained in Sections II.C and III.C *supra*, the Shell Parties have never taken any actions in Nigeria; they are merely holding companies. There is no well-defined standard of international law that would hold them responsible for arrests or detentions conducted by the Nigerian government simply because they own a subsidiary that allegedly provided ammunition, food or information to the Nigerian military or police.

CONCLUSION

For the foregoing reasons, the Shell Parties respectfully request that this Court dismiss this action for lack of subject matter jurisdiction or direct the district of court to dismiss the Amended Complaint in its entirety.

Dated: June 6, 2007

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) and this Court's May 4, 2007 Order (denying the Wiwa Plaintiffs' motion to intervene) because this brief contains 13,306 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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June 6, 2007

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA

Plaintiffs-Appellants-Cross-Appellees,

-----v.-----

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

I. SHELL MISAPPREHENDS *SOSA v. ALVAREZ-MACHAIN* 3

A. The Norms Plaintiffs Seek to Enforce Are Universally Accepted 4

B. Under *Sosa*, the Cause of Action in ATS Cases is Rooted in the Federal Common Law 6

C. Shell Misstates The Customary Law of Piracy 11

II. THIS COURT SHOULD FIND PLAINTIFFS' EXTRA-JUDICIAL EXECUTION CLAIMS TO BE ACTIONABLE 13

A. Extra-Judicial Execution Is Actionable Under the ATS 13

B. Shell Is Liable to Plaintiffs Under Aiding and Abetting and Conspiracy Theories of Liability 14

1. Aiding and Abetting is Well-Established in Federal Common Law and International Law 15

2. Conspiracy Liability For Plaintiffs' Violations is Well-Established in Federal Common Law and International Law 28

C. Plaintiffs Have Adequately Pleaded the State Action Requirement 30

D. The Torture Victim Protection Act Does Not Preclude Plaintiffs' Claims Under the ATS 37

E. Shell is Liable For the Actions of Its Wholly-Owned Subsidiary, SPDC, Under Theories of Agency and Alter Ego Liability 42

III. PLAINTIFFS CRIMES AGAINST HUMANITY CLAIMS ARE ACTIONABLE 48

IV. PLAINTIFFS' CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIMS ARE ACTIONABLE 52

V. PLAINTIFFS ARBITRARY ARREST AND DETENTION CLAIMS ARE ACTIONABLE 55

CONCLUSION 58

TABLE OF AUTHORITIES

Page(s)

CASES

Abebe-Jira v. Negewo,
72 F.3d 844 (11th Cir. 1996) 6-7, 37, 53

Aldana v. Del Monte Fresh Produce, NA., Inc.,
416 F.3d 1242 (11th Cir.
2005).....16, 31, 41, 48, 49, 53

Anderson v. Abbott,
321 U.S. 349 (1944).....47

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.),
No. 91, ¶ 403 (I.C.J. Feb. 26, 2007) 20

Beanal v. Freeport-McMoran, Inc.,
197 F.3d 161 (5th Cir. 1999) 37

Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.,
210 F.3d 18 (1st Cir. 2000).....47

Branch v. Smith,
538 U.S. 254 (2003).....40

Breach of Neutrality,
1 Op. Att'y Gen. 57, 59 (1795) 17

Bodner v. Banque Paribas,
114 F. Supp. 1078 (S.D. Fla. 1997) 16

Boim v. Quranic Literacy Institute,
291 F.3d 1000 (7th Cir. 2000) 18

Bowoto v. Chevron Texaco Corp.,
312 F. Supp. 1229, 1247 (N.D. Cal.
2004) 16, 45, 46

Burnett v. al Baraka Inv. & Dev. Corp.,
274 F. Supp. 2d 86 (D.D.C. 2003) 16

Cabello v. Ferandez-Larios,
402 F.3d 1148 (11th Cir.
2005) 15-16, 19, 28, 29, 48, 49

Estate Cabello v. Fernandez-Larios,
157 F. Supp. 2d 1345 (S.D. Fla. 2001) 53

Cantrell v. Forest City Publ'g Co.,
419 U.S. 245, 253 (1974) 44

Carmichael v. United Tech. Corp.,
835 F.2d 109 (5th Cir. 1988) 16

Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 23

Chavez v. Carranza,
413 F. Supp. 2d 891 (W.D. Tenn. 2005) 41

Chavez v. Carranza,
2006 U.S. Dist. LEXIS 63257 (D. Tenn. 2006) ... 48

Corrie v. Caterpillar Inc.,
403 F. Supp. 2d 1019 (W.D. Wash. 2005) 16, 37

Cumis Ins. Soc., Inc. v. Peters,
983 F. Supp. 787 (N.D. Ill. 1997) 42

Dennis v. Sparks,
449 U.S. 24, 27-28 (1980) 33

Doe v. Exxon Mobil Corp.,
993 F. Supp. 3d 20 (D.D.C. 1998) 16

Doe v. Islamic Salvation Front,
257 F. Supp. 2d 115 (D.D.C. 2003) 7, 40

Doe v. Li Qi,
349 F. Supp. 2d 1258 (N.D. Cal. 2004) 53, 55, 56

Doe v. Saravia,
348 F. Supp. 2d 1112 (E.D. Cal. 2004) 16, 41

Eastman Kodak Co. v. Kavlin,
978 F. Supp. 1078 29

Enahoro v. Abubakar,
408 F.3d 877 (7th Cir. 2005) 37, 38, 39, 41

Estate of Cabello v. Fernandez-Larios,
157 F. Supp. 2d 1345 (S.D. Fla. 2001) 53

Estate of Rodriquez v. Drummond Co. Inc.,
256 F. Supp. 2d 1250 (N.D. Ala. 2003) 32, 35, 38

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 2, 52

Filartiga v. Pena-Irala,
577 F. Supp. 860 (E.D.N.Y. 1984) 7

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,
462 U.S. 611, 629 (1983) 47

Flentye v. Kathrein,
485 F. Supp. 2d 903 (N.D. Ill. 2007) 42

Flores v. Southern Peru Copper Corp.,
414 F.3d 233 (2d Cir. 2003) 20, 32

Flores v. Southern Peru Copper Corp.,
253 F. Supp. 2d 510 (S.D.N.Y. 2002),
aff'd 343 F.3d 140 (2d Cir. 2003) 24, 37

Forti v. Suarez-Mason,
672 F. Supp. 1531, 1541 (N.D. Cal. 1987) 57

Fries v. Barnes,
618 F.2d 988 (2d Cir. 1980) 33

Halberstam v. Welch,
705 F.2d 472 (D.C. Cir. 1983) 17, 29

Hilao v. Estate of Marcos,
103 F.3d 767 (9th Cir.
1996) 16, 20, 29, 37, 38, 40, 57

In re Agent Orange Product Liability Litigation,
373 F. Supp. 2d 7 (E.D.N.Y.) 16, 19, 45

In re South Africa Apartheid Litigation,
346 F. Supp. 2d 538 (S.D.N.Y. 2004) 16

In re Terrorist Attacks on September 11, 2001,
349 F. Supp. 2d 765 (S.D.N.Y. 2005)) 16, 29

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) ..... *passim*

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322
(N.D. Ga. 2002)..... 16, 18, 19, 20, 27, 48, 52, 53

Meyer v. Holley,
537 U.S. 280 (2003) 44

Monarch Ins. Co. v. Ins. Corp. of Ir., Ltd.,
835 F.2d 32, 36 (2d Cir. 1987) 46

Mujica v. Occidental Petroleum Corp.,
381 F. Supp. 2d 1164 (C.D. Cal.
2005)..... 23, 35, 38, 41, 48, 49

Olivia v. United States Department of Justice,
433 F.3d 229 (2d Cir. 2005) 42

Phelan v. Local 305, United Ass'n of Journeymen,
973 F.2d 1050 (2d Cir. 1992) 46

Posadas v. Nat'l City Bank of New York,
296 U.S. 497 (1936) 40

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
374 F. Supp. 2d 331 (S.D.N.Y. 2005)..... 16

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
244 F. Supp. 2d 323 (S.D.N.Y.
2003)..... 16, 19, 20, 32, 34, 48

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
226 F.R.D. 456 (S.D.N.Y. 2005) 51

Project Hope v. M/ V IBN SINA,
250 F.3d 67 (2d Cir. 2001) 17

Prosecutor v. Furundzija,
IT-95-17/1-T, (Dec. 10, 1998) 18, 19

Prosecutor v. Kayeshima,
No. ICTR-95-1-T (Trial Chamber, May 21, 1999) 27

Prosecutor v. Kamuhanda,
Case No. ICTR-95-54A-T, (June 22, 2004) 51

Prosecutor v. Kordic,
No. IT-95-14/2 (ICTY Trial Chamber, Feb. 26, 2001) 27

Prosecutor v. Krajisnik,
No. IT-00-39-T (ICTY Trial Chamber, Sept. 27, 2006) 51

Prosecutor v. Musema,
No. ICTR-96-13-A (ICTR Trial Chamber, Jan. 27, 2007) 21

Prosecutor v. Tadic,
Case No. IT-94-1-T (May 7, 1997) 19, 30, 49, 51

Prosecutor v. Vasiljevic,
IT-98-32-A at ¶ 102 21

Sarei v. Rio Tinto, PLC,
___ F.3d ___, 2007 U.S. App. LEXIS 8430
9th Cir. 2007).....6-17, 23, 43

Sarei v. Rio Tinto, PLC
456 F.3d 1069 (9th Cir. 2006).....44, 48

Seymour v. Summa Vista Cinema, Inc.,
809 F.2d 1385 (9th Cir. 1987).....46

Sinaltrainal v. Coca-Cola Co.,
256 F. Supp. 2d 1345 (S.D. Fla. 2003).....38

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004).....*passim*

Sosa v. Alvarez-Machain,
2004 U.S. TRANS LEXIS 29, (U.S. TRANS
2004).....2

Spear v. Town of West Hartford,
954 F.2d 63 (2d Cir. 1992).....33

Tachiona v. Mugabe,
234 F. Supp. 2d 401 (S.D.N.Y. 2002).....53

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984).....7, 9

The Barcelona Traction, Light & Power Co. (Belg. v. Spain),
1970 I.C.J. 3 (Judgment of Feb. 5, 1970).....47

The Paquete Habana,
175 U.S. 677 (1900).....4-5, 20

U.S. v. Flick,
6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1198 21-22

U.S. v. Krauch
8 Trials of War Criminals Before the Nuremberg Military Tribuals Under Control Council No. 10, at 1189 23

U.S. v. Hostages Case,
1980 I.C.J. 3, ¶ 91 56

Winterwerp Case,
33 Eur. Ct. H.R., (ser. A) ¶ 39 (1979) 56

Wiwa v. Royal Dutch Petroleum Co.,
2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) 48-49

Xuncax v. Gramajo
886 F. Supp. 162, 180 (D. Mass. 1995) 7, 53, 55

STATUTES AND REGULATIONS

18 U.S.C.
§ 1350 ..... *passim*

42 U.S.C.
§ 1983 ..... 9, 32, 33, 34

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Art 6 55

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Charter of the United Nations 56

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 34, 53

European Convention for the Protection of Human Rights and Fundamental Freedoms 56

ICCPR 52, 55

ICTR Statute 18, 21, 51, 53

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TVPA ..... *passim*

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OTHER AUTHORITIES

137 Cong. Rec. S1369-01, 1991 Westlaw 9635 37

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Brief for the United States as Amicus Curiae, 2001 WL 34108081 18

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Restatement (Second) of Agency
§14M reporter's note 45
§ 216 44
§ 219 44
§§ 228-236 44

Restatement (Third) of Foreign Relations Law
§ 702 ..... 49, 52, 55, 57

Restatement (Second) of Torts,
§ 876 (b) 17, 18, 33

S. Rep. No. 102-249 ..... 34, 39

INTRODUCTION

Defendants[1] do not seriously contest that Plaintiffs' claims for extra-judicial execution and torture satisfy the Supreme Court's test for actionable international norms under the Alien Tort Statute ("ATS") set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Indeed, Shell concedes that Plaintiffs' claims of extrajudicial execution meet the *Sosa* test.

Shell contests the actionability of Plaintiffs' arbitrary arrest and detention claims based on *Sosa*; however, Plaintiffs' claims have long been recognized as actionable under the ATS. The same is true of Plaintiffs' crimes against humanity and cruel, inhuman and degrading treatment claims.

Shell's half-hearted efforts to claim that the egregious conduct of which Plaintiffs complain in this case falls outside established international human rights law are abortive. Plaintiffs' claims lie at the heart of the international community's system of human rights protection and clearly constitute violations of the "law of nations" within the meaning of the ATS.

Shell's efforts to distance itself from the human rights violations it facilitated are equally unavailing. In essence, Shell makes a policy argument that the ATS should not apply to corporations that actively assist in egregious human rights violations because

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[1] Defendants and Appellees/Cross Appellants Royal Dutch Petroleum Co. and Shell Transport and Trading Company are referred to collectively as "Shell" or "Defendants" in this brief.

this might be harmful to multinational corporations like Shell that do business with brutal dictatorships. This policy argument is based on a vast exaggeration of the reach of aiding and abetting liability, which does not reach corporations that merely do business in a country. The relevant standard under both federal and international law is knowingly providing practical assistance that has a substantial effect on the perpetration of human rights violations.

In *Sosa*, the Supreme Court suggested that the Administration and others seeking to restrict the scope of the ATS should direct such arguments to Congress.[2] To date, neither the Administration nor the corporate community has done so. The First Congress understood when it passed the ATS that aiding and abetting and conspiracy were part of the common law, and the courts in the modern era have generally been faithful to that understanding. There is no basis for the corporate immunity Shell seeks in this case.

The ATS was passed to enforce the "law of nations." Under the allegations in Plaintiffs' complaint, Shell conspired with and aided and abetted the prior Nigerian dictatorship in committing human rights violations that were condemned throughout the world. Now that Shell has conceded that Plaintiffs' extra-judicial execution claims meet the *Sosa* standard, the District Court's ruling allowing Plaintiffs' claims to proceed to trial should be affirmed.

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[2] *Sosa v. Alvarez-Machain*, 2004 U.S. TRANS LEXIS 29, *8-9 (U.S.TRANS 2004).

I. SHELL MISAPPREHENDS *SOSA v. ALVAREZ-MACHAIN.*

Shell's highly selective citations to the *Sosa* decision ignore the fact that the *Sosa* Court endorsed the decisions in most ATS cases before 2004, including this Court's decisions in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). *Sosa*, 542 U.S. at 731 & 732 n.20.[3]

To be sure, the *Sosa* decision includes cautionary language but such caution does not preclude the enforcement of fundamental human rights norms prohibiting extra-judicial execution, torture, cruel, inhuman and degrading treatment, prolonged arbitrary detention and crimes against humanity. These norms are clearly actionable under the *Sosa* test.

Sosa does not require courts to find specific support in the law of nations for the exact manner in which such violations are committed. Shell's attempt to transform ATS analysis into an exercise in definitional hair-splitting has no place in the enforcement of such universally accepted norms. Congress passed the ATS to give the federal courts full authority to enforce the law of nations through common law tort remedies and *Sosa* fully endorsed the contemporary application of this historical purpose.

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[3] The fact that the ATS is jurisdictional, Shell Brief ("SB") 12, is of no moment, because the *Sosa* Court found that the ATS authorized the federal courts to employ federal common law to enforce the "law of nations" and that nothing in the last two centuries had displaced this Congressional mandate. *Sosa*, 542 U.S. at 730-31.

A. The Norms Plaintiffs Seek to Enforce Are Universally Accepted.

In *Sosa*, the Supreme Court held that a claim under the "present-day law of nations" exists for "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." 542 U.S. at 724. The language in *Sosa* that Shell quotes, SB 14, is the Court's explanation of why it created the historical paradigm test, a test easily satisfied by the norms relied upon by Plaintiffs in this case.

Indeed, Shell does not dispute that extra-judicial execution and torture satisfy this standard. Although Shell challenges whether cruel, inhuman and degrading treatment, crimes against humanity, and prolonged arbitrary arrest and detention satisfy the *Sosa* standard, their arguments are based on a flawed understanding of the sources of customary international law. Evidence of customary norms comes from many different sources, not all of which are directly binding on the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[Courts look] to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . . .").

Moreover, contrary to Shell's position, cruel, inhuman and degrading treatment, crimes against humanity, and prolonged arbitrary arrest and detention have core definitions that are well established under international law and that satisfy the *Sosa* standard for norms actionable under the ATS. A plaintiff need only show that a norm has an

identifiable core of prohibited behavior, even if there is diversity of definitions at the periphery of the norm. Appellant's Opening Brief 19-20 ("AOB"); Brief of *Wiwa* Plaintiffs as Amici Curiae in Support of Appellants ("*Wiwa Amicus*") at 15-16. While there may be differences at the periphery, there are well-established, core definitions of cruel, inhuman and degrading treatment, crimes against humanity, and prolonged arbitrary arrest and detention that fall squarely within the *Sosa* standard.

Each of the violations at issue in this appeal is actionable under *Sosa*, and Plaintiffs have set forth in their complaint facts sufficient to establish their claims under the ATS.

B. Under *Sosa*, the Cause of Action in ATS Cases is Rooted in the Federal Common Law.

The Supreme Court's *Sosa* decision settled the question of the source of applicable law in ATS cases. The Court ruled that the federal common law provided the cause of action for certain violations of international law. *Sosa*, 542 U.S. at 724.

Although *Sosa* instructs courts in ATS cases to look to international law when determining whether the threshold international norm is specific, universal, and obligatory, the Court made clear that the cause of action, which provides the remedy for violations of certain international norms, is derived from the federal common law. As the Court explained, "[t]he jurisdictional grant is best read as having been enacted on the understanding that *the common law* would provide a cause of action for the modest number of

international law violations with a potential for personal liability at the time." *Sosa*, 542 U.S. at 724 (emphasis added). The Court went on to reiterate this point, describing the process of determining whether a claim is actionable under the ATS as whether a court should "*recognize private claims under federal common law* for violations" of an international law norm. *Id.* at 732 (emphasis added).[4]

Shell's argument, that the "law of nations" itself has to define every aspect of this federal common law cause of action, would undermine the purpose of the ATS. "To require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the 'law of nations' portion of section 1350." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J. concurring). This is because international law does not define the means of its domestic implementation, but leaves that

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[4] Even prior to the Supreme Court's decision in *Sosa*, courts understood that the federal common law provided the cause of action in ATS cases. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law"); *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) (with the ATS, Congress gave courts the power to develop federal remedies to effectuate the purposes of international law as incorporated into federal common law); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995) (same); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.12 (D.D.C. 2003) ("tort principles from federal common law may be more useful" than international law in determining secondary liability).

determination to the domestic laws of the various states. *Id.*[5]

The drafters of the ATS expected the common law to supply the rules necessary to litigate claims so long as the plaintiff brought a claim for "tort committed in violation of the law of nations." As the Supreme Court recognized in *Sosa*, the "law of nations" has changed in the last two centuries and international human rights law is now well established. *Sosa*, 542 U.S. at 724-25, 732. *Sosa* affirmed this Court's central insight in *Filartiga* that after Nuremberg and the development of international human rights law, the "law of nations" was directly concerned with the way that all governments treated their own citizens and that individuals should be held responsible for such violations.

Shell's claim that these issues are decided by reference only to international law is based on its mischaracterization of footnote 20 in *Sosa*, SB 11-12, in which the Court stated that a "related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a

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[5] Significantly, the *Sosa* Court cited to Judge Edwards's opinion in *Tel-Oren* and not to Judge Bork's concurring opinion. 542 U.S. at 732. Shell's arguments, that international law must supply all the rules governing ATS litigation, are the same type of arguments made by Judge Bork and which would hamstring the enforcement of international law under the ATS. Judge Edwards, on the other hand, recognized that the common law would supply the rules that would enable federal courts to implement the intent of Congress in enacting the ATS. *See Tel-Oren*, 726 F.2d at 777-778 (Edwards, J., concurring).

corporation or individual." *Sosa*, 542 U.S. 733, n.20. The case citations and parentheticals accompanying this sentence make clear that the Court is discussing the distinction between acts that violate international law when committed by private actors (*e.g.* genocide) and those that do so only when the individual acts under the color of state authority (*e.g.* torture).[6]

Footnote 20 does not, as Shell claims, support their argument that international law determines issues of aiding and abetting and conspiracy liability. Rather, footnote 20 is simply an affirmation of this Court's methodology in *Kadic*,[7] and has nothing to do with whether aiding and abetting liability is available under the ATS.

The "specificity" requirement discussed in *Sosa* concerned only the issue of whether the plaintiff's particular claim was supported adequately by international authorities. In *Sosa*, the plaintiff's claim failed to meet this requirement because the international authorities prohibiting arbitrary arrest

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[6] *Sosa*, 542 U.S. at 733 n.20 ("Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 744, 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)").

[7] While Shell cites *Kadic* as an example of this Court's use of the law of nations to prove given violations, this Court in fact used federal common law rules to define the scope of liability under the ATS in *Kadic*, stating, for example, that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the [ATS]." *Kadic*, 70 F.3d at 245.

and detention did not necessarily prohibit a detention of less than 24 hours without proper local authority. 542 U.S. at 738. The Court was concerned about the practical consequences of finding that any short detention not supported by proper authority was a violation of the law of nations. However, the Court in no way rejected the existence of the well-established norm prohibiting prolonged arbitrary detention. *See, infra* § V.

The "specificity" requirement has nothing to do with the liability of private parties under international law, *see Kadic*, 70 F.3d at 239-45, or the availability of aiding and abetting liability under the ATS. In fact, the *Sosa* Court simply did not discuss aiding and abetting liability at all.

The ATS requires a tort committed in violation of the law of nations and *Sosa* directs that federal common law principles determine the other issues, including available theories of liability and defenses, required to implement the Congressional purpose behind the ATS. A court can, of course, look to international law principles as part of its federal common law analysis, but ultimately, the question is one of the federal common law. In any event, even if international law governs aiding and abetting or conspiracy, customary international law provides for such liability for fundamental human rights violations.

C. Shell Misstates The Customary Law of Piracy.

Shell's misstatement of the law of piracy is instructive. SB 18-19. Contrary to Shell's claim, the law of nations applied not to "the pirate only," but also

to those who aided and abetted piracy. *See* William Blackstone, Commentaries on the Laws of England, Book IV, Chap. 5 (1769). Blackstone recognized that those who aided and abetted pirates were themselves liable as pirates. *Id.* In *Sosa*, the Court repeatedly relied on Blackstone as the authoritative statement of international law at the time the ATS was enacted. *Sosa*, 542 U.S. at 718 n.12, 722, 723, and 737.

Shell's claim, that aiding and abetting piracy could not have been barred by common law because it was barred by statute, SB 18-19, flies in the face of the *Sosa* Court's reasoning:

> The notion that it would have been absurd for the Continental Congress to recommend that States pass positive law to duplicate remedies already available at common law rests on a *misunderstanding of the relationship between common law and positive law in the late 18th century*, when positive law was frequently relied upon to reinforce and give standard expression to the "brooding omnipresence" of the common law then thought discoverable by reason. As Blackstone clarified the relation between positive law and the law of nations, "those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of [its] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world." 4 Commentaries 67.

Sosa, 542 U.S. at 722 (emphasis added) (footnote omitted).

Moreover, the act of piracy itself, which the *Sosa* Court recognized as one of the paradigmatic ATS violations, was barred by statute. Shell conveniently omits much of language of relevant passage from Blackstone, which makes clear that the statute criminalized piracy itself, not merely accessory to piracy:

> As, by statute 11 & 12 W.III. *c. 7 if any natural born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And farther, any commander, or other seafaring person, betraying his trust, and running away with* any ship, boat, ordinance, ammunition or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts . . . shall, for each of these offenses, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal or accessory.

4 Blackstone, Ch. 5, at 72 (emphasis added). If Shell is correct, then piracy itself would not have been actionable under the ATS because it was also proscribed by statute. This simply cannot be squared with *Sosa*. 542 U.S. at 694.

II. THIS COURT SHOULD FIND PLAINTIFFS' EXTRA-JUDICIAL EXECUTION CLAIMS TO BE ACTIONABLE.

A. Extra-Judicial Execution Is Actionable Under the ATS.

The District Court found that the law of nations prohibits extra-judicial executions; however, it dismissed Plaintiffs' extra-judicial execution claim because Plaintiffs had not "directed the Court to any international authority establishing the elements of extra-judicial killing." J.A. 0015. The District Court stated that it was, thus, "unpersuaded that there is a well-defined customary international law that prohibits the conduct Plaintiffs allege to be extra-judicial killing." *Id.*

Plaintiffs, in their Opening Brief, have set forth the elements of an extra-judicial killing claim and the various ways in which Dr. Kiobel's execution violated the customary international norm prohibiting extra-judicial executions. See AOB 19-36, 50-54. Plaintiffs have alleged that the Special Tribunal responsible for Dr. Kiobel's execution was not, in actuality, a judicial court operating within the framework of Nigerian law. Rather, the Special Tribunal was a political body established by a military dictatorship in order to kill its political opponents. AOB 6-9. This is, in effect, no different than a government lining up its opponents and shooting them. Plaintiffs' AOB establishes that under international law, executions ordered by "courts" such as these violate the specific, universal, and

obligatory norm prohibiting extra-judicial executions.[8] In light of these irrefutable authorities, Shell does not defend the District Court's ruling in this Court. SB 21-22.

B. Shell Is Liable to Plaintiffs Under Aiding and Abetting and Conspiracy Theories of Liability.

Shell tries to re-frame the issue by arguing that "the question here is whether the alleged bribery of witnesses or hosting of a reception by someone who is not the killer (or torturer) rises to the level of a violation of the law of nations." SB 22. This, of course, is not the issue decided in Shell's favor below. The issue in this case is whether Shell provided practical assistance to the direct perpetrators of this crime which had a substantial effect on the perpetration of this crime. The District Court found that Plaintiffs' allegations were sufficient to establish aiding and abetting liability and its decision should be affirmed here.

Shell's main argument is that it may not be found liable unless the law of nations prohibits the specific acts of aiding and abetting Shell committed in connection with the deaths of Plaintiffs' family members. SB 21, 22, 28. This argument is not unlike an argument that a defendant cannot be found liable for torture if the defendant has devised an unusually effective but novel way to destroy the body or mind of his victim. Nothing in *Sosa* or any other case requires

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[8] *See also* Brief of *Amici Curiae* International Law Professors in Support of Plaintiffs-Appellants.

this Court to accept such a ludicrous principle. The issue is whether Plaintiffs have alleged sufficient facts to attribute liability to these defendants on either an aiding and abetting or a conspiracy theory of liability.

Plaintiffs' claims are not based merely on Shell "doing business" with a brutal regime. SB 22. Plaintiffs allege that Shell engaged in specific acts of assistance that contributed substantially to the human rights violations they suffered. J.A. 0132-0142, ¶¶ 44-80. These allegations are more than sufficient in this procedural posture.

1. Aiding and Abetting is Well Established in Federal Common Law and International Law.

The District Court was correct in finding, along with virtually every court to consider this issue, that aiding and abetting liability is available under the ATS. Under international and federal common law, aiding and abetting liability arises when a defendant provides knowing, practical assistance that has a substantial effect on the perpetration of the human rights violation. Both before and after *Sosa*, courts have overwhelmingly found aiding and abetting liability to be actionable under the ATS. *See, e.g.*, *Cabello v. Ferandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) ("[T]he ATCA and the TVPA are not limited to claims of direct liability. The courts that have addressed the issue have held that the ATCA reaches conspiracies and accomplice liability.").[9]

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[9] *Accord Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (ATS reaches conspiracies and

Only three district court decisions have found that the ATS does not provide aiding and abetting liability.[10]

As the Ninth Circuit recently recognized, aiding and abetting liability has been part of the ATS from its inception. *Sarei v. Rio Tinto, PLC*, ____F.3d ____, 2007 U.S. App. LEXIS 8430 at *18-19 (9th Cir. 2007)

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accomplice liability for torture); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776-77 (9th Cir. 1996) (affirming jury instruction allowing former Phillipine leader to be held liable upon finding that he "directed, ordered, conspired with, or aided and abetted the military in torture, summary execution, and 'disappearance'"); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002) (liability for aiding and abetting torture and other rights violations); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289, 321-24 (S.D.N.Y. 2003); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004); *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 52-56 (E.D.N.Y.); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 1229, 1247 (N.D. Cal. 2004); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Burnett v. al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003).

[10] *See Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) and *Corrie v. Caterpillar Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *appeal pending*, No. 36210 (9th Cir.), both of which merely follow the reasoning of *In re South Africa Apartheid Litigation*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004). The *Apartheid* decision was argued before this Court on January 24, 2006. It has not even been followed by other district judges in the Second Circuit. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 340-41 (S.D.N.Y. 2005).

(citing *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795)). The influential 1795 opinion issued by Attorney General Bradford, relied on by the *Sosa* Court, 542 U.S. at 721, specifically states that individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). Significantly, this incident involved private actors, acting in concert with but certainly not controlling French naval vessels. *See id.* In short, the interpretation of the ATS and the Bradford Opinion accepted by the Supreme Court includes the venerable concept that those who aid and abet violations of international law are responsible for those violations. Nothing since 1789 has altered this concept.

Because the ATS is a civil tort statute providing a remedy in tort, the appropriate standard for aiding and abetting is the federal common law standard reflected in the Restatement (Second) of Torts § 876 (b),[11] which provides for aider and abettor liability where the defendant (a) "does a tortious act in concert with another," or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement"[12] In *Boim v. Quranic*

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[11] *See Project Hope v. M/ V IBN SINA*, 250 F.3d 67, 76 (2d Cir. 2001) (citing the Restatement (Second) of Torts as a source of federal common law). *Halberstam v. Welch*, 705 F.2d 472, 477-78 & n.6 (D.C. Cir. 1983) (affirming that aiding abetting and conspiracy are well within Restatement § 876).

[12] The ATS is a civil, not a criminal, statute. It provides a civil remedy for violations of international law that involve criminal acts, just as a wrongful death statute provides a civil remedy for violations of state law that involve criminal acts. Indeed,

Literacy Institute, 291 F.3d 1000 (7th Cir. 2000), the United States filed an *amicus* brief stating that the standard in Restatement § 876 (b) is the appropriate federal common law standard.[13] Shell does not even mention, much less attempt to refute, these authorities.

This standard is virtually identical to the standard found in international criminal law, as articulated by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Furundzija*, No. IT-95-17/1-T, ¶¶ 192-234 (Trial Chamber, Dec. 10, 1998), relying on a comprehensive analysis of international case law and international instruments.[14] Aiding and abetting under this standard requires as the *actus reus* "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," *id.* at ¶ 235, and as the *mens rea* "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime." *Id.* at ¶ 245.

Indeed, courts both before and after *Sosa* have recognized this standard for aiding and abetting

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Blackstone's three paradigmatic international law violations were also considered criminal, but the ATS was established to provide a civil cause of action for these crimes under the federal common law.

[13] Brief for the United States as *Amicus Curiae*, 2001 WL 34108081 at *10-*11.

[14] *Mehinovic*, 198 F. Supp. 2d at 1355-56 (finding that aiding and abetting liability is available under the ATS, relying on the Rome Statute; Nuremberg Tribunal Charter, art. 6; ICTY Statute, art. 7(1); ICTR Statute, art. 6(1) and TVPA).

liability. *Mehinovic*, 198 F. Supp. 2d at 1356 (relying on *Furundzija*, No. IT-95-17/1-T at ¶¶ 192-249 in support of its definition of aiding and abetting as knowing, practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime); *accord Cabello*, 402 F.3d at 1158-59; *Presbyterian Church*, 244 F. Supp. 2d at 323-24; *In re Agent Orange*, 373 F. Supp. 2d at 54.

Shell makes no effort to respond to these established international authorities. Shell argues that the decisions from international criminal tribunals are not primary sources of international law. However, because the ICTY is "only empowered to apply" standards that are "beyond any doubt customary law," its judgments should be accorded substantial weight in determining the content of customary international law. *Prosecutor v. Tadic*, Case No. IT-94-1-T, ¶¶ 661-662 (Trial Chamber, May 7, 1997). Indeed, both U.S. courts and the International Court of Justice regularly rely upon the statute and jurisprudence of the ICTY as evidence of international law.[15]

Shell's argument is based on a misunderstanding of customary international law itself. Evidence of customary norms comes from many different sources. *See The Paquete Habana*, 175 U.S. at 700 ("[Courts look] to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and

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[15] *See, e.g.*, *Presbyterian Church*, 244 F. Supp. 2d at 323-24; *Mehinovic*, 198 F. Supp. 2d at 1355-56; *Hilao*, 103 F.3d at 777; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)* ¶¶ 403, 413 (I.C.J. Feb. 26, 2007).

commentators[.]"). *Flores v. Southern Peru Copper Corp.*, 414 F.3d 239, 242-3 (2d Cir. 2003), did not overrule the methodology this Court established in *Filartiga* and *Kadic* (both of which considered non-binding sources in their analysis of customary international law) for ascertaining international law norms. *Sosa* itself reaffirmed this traditional approach to the analysis of customary international law. 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. at 700).

Shell is also wrong that the international criminal tribunals are inconsistent in their treatment of aiding and abetting liability. SB 25. The fact that the statutes of the tribunals have slight variations in language does not detract from the core definition of aiding and abetting liability that has been consistently recognized by ICTY and International Criminal Tribunal for Rwanda decisions. *Prosecutor v. Vasiljevic*, No. IT-98-32-A, ¶ 102 (Appeals Chamber, February 25, 2004); *Prosecutor v. Musema*, No. ICTR-96-13-A, ¶ 126, 179-182 (Trial Chamber, January 27, 2007).

Nor does the Rome Statute of the International Criminal Court assist Shell. The Rome Statute's "for the purpose of facilitating the commission of a crime" language is entirely consistent with the customary international law definition of aiding and abetting, under which the *mens rea* element is satisfied by knowledge that "the acts performed by the aider and abettor assist the commission of a specific crime of the principal." *Prosecutor v. Vasiljevic*, IT-98-32-A ¶ 102. "For the purpose of facilitating the commission of the crime" means only that the perpetrator be "aware that the consequence will occur in the ordinary course of events." Gerhard Werle, Principles of International

Criminal Law, ¶¶ 306-307, 330. Moreover, nothing in that treaty is intended to alter customary international law, Rome Statute, Art. 22(3), and the ATS enforces customary international law, not the Rome Statute.

Since Nuremberg, defendants have been found liable when they gave substantial assistance with the knowledge that such assistance would facilitate the commission of the crimes. For instance, in *Flick*, the Nuremberg Tribunal found Flick guilty based on his knowledge and approval of his employee's decision to increase the company's production quota knowing this would require forced labor. *U.S. v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10. The Tribunal held Flick fully responsible although the slave labor program had its origin in the Nazi regime, and he did not "exert[] any influence or [take] any part in the formation, administration or furtherance of the slave-labor program." *Id.* at 1198. His role within the company was limited to general oversight. *See id.* at 814-17. Indeed, Flick testified that it was not his intent to use slave labor, and he denied that he had full knowledge that slave labor was being used until very late in the war. *Id.* at 806. Similarly, Flick's co-defendant, Steinbrinck was convicted "under settled legal principles" for "knowingly" contributing money to an organization committing widespread abuses, even though it was "unthinkable" he would "willingly be a party" to atrocities. *Id.* at 1217, 1222.

Similarly, in *Krauch*, the Tribunal found Krauch guilty although, as in *Flick*, he did not create the slave labor program or control the allotment process. Krauch simply made an affirmative decision to conduct business knowing that it would result in the use of

forced labor. For this, the Tribunal found him guilty, stating, "Krauch was neither a moving party or an important participant in the initial enslavement of workers . . . [but] in view of what he clearly must have known about the procurement of forced labor and the part he voluntarily played in its distribution and allocation, his activities . . . impel us to hold that he was a willing participant in the crime of enslavement." *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10, at 1189.

Finally, Shell's reliance on *Central Bank of Denver N.A. v. First Interstate Bank of Denver, NA.*, 511 U.S. 164 (1994), is misplaced. SB 24. *Central Bank* addressed whether aiding and abetting liability was available under federal securities law and held that this was a matter of legislative intent. There was no evidence of that intent in the securities statute at issue in *Central Bank*. *Id.* at 177-78. By contrast, as the *Sosa* Court found, the drafters of the ATS expected common law rules to apply to ATS litigation, 542 U.S. at 713, and aiding and abetting liability was a feature of the common law at that time, *see Sarei*, 2007 U.S. App. LEXIS 8430 at *18-19, and it has remained so since.[16]

Accordingly, a defendant can be held liable for aiding and abetting a violation of international law if that defendant knowingly provides practical assistance that has a substantial effect on the perpetration of the crime. This is true under either federal common law or international law.

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[16] *See also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1172 (C.D. Cal. 2005).

Shell argues that international law must prohibit the particular acts it undertook to aid and abet the extra-judicial executions at issue in this case. SB 20-21. Were Shell's argument correct, a defendant could never be liable for aiding and abetting violations of international law–even if it sold Zykion B to the Nazis with the knowledge that it would be used to exterminate Jews or provided machetes to the Interhamwe during the Rwandan genocide with the knowledge that these would be used to massacre Tutsis–because no specific international norm prohibits the provision of Zykion B or machetes to mass murderers. This is a caricature of aiding and abetting liability.

"[I]t is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition under international law." *Flores*, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002), *aff'd* 414 F.3d 233 (2d Cir. 2003). Neither international law nor any other body of law ever regulates conduct with the level of specificity Shell would require. The facts of every case are different, and law does not anticipate and specify every conceivable way in which a rule can be violated. Instead, international law, like other law, sets out standards that courts must use to evaluate specific conduct. It is an issue for the jury whether Shell's actions, as alleged by Plaintiffs, meet the well-established standard for aiding and abetting liability in federal common law.

Plaintiffs have alleged that Shell security personnel called in government troops to fire on crowds and handed over Plaintiffs to Nigerian authorities for the purpose of arbitrarily detaining them. J.A. 0128, ¶ 14. SPDC also called in the

Mobile Police Force, popularly known as the "Kill and Go Mob," for committing massacres and other violations, to provide security for its camps; two days later the forces carried out scorched earth operations, massacring 80 villagers and destroying hundreds of homes. *Id.* at ¶ 41. Knowing of these violations, Shell and SPDC continued to use Nigerian military and police forces for security. *Id.* at ¶ 42. Shell and SPDC directed their contractor to begin construction of a pipeline which they knew or should have known would involve destruction of civilian property under the supervision of government forces. SPDC requested the "usual assistance to allow further work on the pipeline," which was followed by attacks on villagers, including a massacre of 750 civilians, during which Plaintiff Ikari was shot in the face. *Id.* at ¶¶ 45-48.

Moreover, Shell and SPDC provided logistical and financial support for the operations of the Rivers State Internal Security Task Force ("ISTF"), including transportation, food and ammunition, despite its engagement in repeated acts of murder, torture, rape, cruel, inhuman and degrading treatment, crimes against humanity, and property destruction. *Id.* at 54. Shell and SPDC's financial support included cash to support ISTF operations and bribes to its commander. *Id.* SPDC, with the approval of Shell, also requested that the Nigerian Police Inspector General increase security by 1200 men to quell community disturbance, and Shell promised to provide logistical and financial support for this increased force, including salaries, housing, uniforms, weapons, riot gear, and vehicles. *Id.* at ¶ 51.

Shell and SPDC also imported arms for and made payments to Nigerian military, police, and security personnel whose sole function was to facilitate Shell and SPDC operations in the Niger Delta; they exchanged intelligence with these forces, provided transport, and participated in regular meetings, planning, and coordination of security operations, including raids and terror campaigns, with the Nigerian forces. *Id.* at ¶¶ 47-57, 80.

This support constituted practical assistance which not only had a substantial effect on the perpetration of the violations, but provided the motivation for the violations in the first place. Many of these operations would not have been carried out but for Shell and SPDC's desire to explore and extract oil without community opposition, and they certainly would not have been financially or logistically feasible without Shell and SPDC's consistent backing and support.

Plaintiffs have alleged that Shell knew or should have known[17] that Dr. Kiobel was being tried by a kangaroo court that lacked procedural protections, and was rife with false testimony, corruption, and bribery.

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[17] Constructive knowledge is the appropriate standard here. *See Mehinovic*, 198 F. Supp. 2d at 1354 n.50 ("International law provides that an actor is responsible if he knew or should have known that his conduct would contribute to a widespread or systematic attack against civilians.") (citing *Prosecutor v. Kayeshima*, No. ICTR-95-1-T, ¶ 133 (Trial Chamber, May 21, 1999) (noting that defendant must have "actual or constructive knowledge" of a widespread or systematic attack) and *Prosecutor v. Kordic*, No. IT-95-14/2, ¶ 185 (Trial Chamber, Feb. 26, 2001) (same)).

J.A. 0139 at ¶ 70. Despite this knowledge, Shell provided substantial assistance and encouragement by, *inter alia*, bribing witnesses, preparing witnesses to give false testimony, and sending representatives to a reception for witnesses and to the trial. *Id.*

In the end, Shell attempts to minimize its participation in these violations by casting its actions as merely "doing business" with the Nigerian government. "Doing business" does not require corporate complicity in gross human rights violations. Plaintiffs do not seek to hold Shell liable for having done business with an indisputably brutal regime. Rather, Plaintiffs seek to hold Shell liable for specific, concrete acts of substantially assisting that regime in committing universally recognized human rights abuses against these particular Plaintiffs.[18]

Finally, that the Nuremberg Tribunal acquitted Karl Rasche of war crimes and crimes against humanity for making loans to the German government is irrelevant. SB 25-26. Shell is not being sued for simply doing business or making loans to the Nigerian government, but for specific, concrete, substantial acts of assisting the Nigerian government to commit well-established violations of international law.

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[18] Additionally, Shell's argument that it is the province of the Executive Branch to forbid companies from dealing with brutal governments does not apply to this case. SB 23 n.8. Plaintiffs do not aruge that Shell cannot do business in Nigeria. The ATS does not prohibit corporations from conducting business with brutal governments, but rather imposes liability for assisting brutal governments to conduct serious human rights violations of the kind Plaintiffs suffered here.

2. Conspiracy Liability for Human Rights Violations is Well Established in Federal Common Law and International Law.

Shell offers no argument, nor does it provide any authority, refuting the existence of conspiracy liability in international law or federal common law. Thus, Shell has essentially waived any claim that conspiracy liability is not applicable here. Every federal court to address the issue has found that liability for ATS claims extends to conspiracies. *See, e.g., Cabello*, 402 F.3d 1148 (recognizing conspiracy liability for a number of international law violations, including torture, extra-judicial killing, cruel and unusual punishment, and crimes against humanity); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d at 565 (conspiracy claim for aircraft hijacking); *Hilao*, 103 F.3d at 776 (affirming jury instructions permitting conspiracy liability for torture, summary execution, and disappearance); *Eastman Kodak Co. v. Kaolin*, 978 F. Supp. 1078, 1090-92 (S.D. Fla. 1997) (recognizing conspiracy liability for unlawful arbitrary detention).

To sustain a claim for conspiracy, Plaintiffs must prove that "(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello v. Fernandez-Larios*, 402 F.3d at 1159 (citing *Halberstam*, 705 F.2d at 481, 487, a case involving a civil conspiracy claim)).

Plaintiffs have done so here. *See* J.A. 0128, ¶¶ 1-4, 26, 27, 37-80.

International law also provides for conspiracy liability. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279 ("leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan"); *see also Prosecutor v. Tadic*, No IT-94-1-A, ¶¶ 204, 205-19 (Appeals Chamber, July 15, 1999).

Thus, whether this court looks to federal common law or to international law, it is clear that individuals who conspire to commit human rights violations are liable under the ATS.

C. Plaintiffs Have Adequately Pleaded the State Action Requirement.

Shell argues that Plaintiffs have failed to establish that Shell is a state actor, and claim that, therefore, it cannot be found liable for extra-judicial killing, torture, or cruel, inhuman and degrading treatment, because these violations require state action. SB 41.[19] This

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[19] Shell also mischaracterizes the International Law Professors' Amicus Brief. SB 27 n.10. Amici argue that the international norm prohibiting extra-judicial killing meets the *Sosa* standard, and nowhere suggest that private parties cannot be held liable for violating this norm.

argument fails for several reasons. First, Plaintiffs are not required to prove that Shell itself was a state actor; the issue is whether state action is present in the violation. *Kadic*, 70 F.3d at 245. Plaintiffs' complaint makes clear that the Nigerian government was the direct perpetrator of Plaintiffs' violations, thereby satisfying the requirement that the underlying abuse be committed by a state actor. J.A. 0145-0149, ¶ 94, 98, 102, 107, 112, and 116. *See Aldana*, 416 F.3d at 1249-50 (allegation that Mayor participated in events was sufficient to allege state action in ATS torture claim against corporation and noting that claim for state-sponsored torture under the ATS may be based on indirect liability as well as direct liability). Plaintiffs' claims against Shell are for aiding and abetting and conspiring with the Nigerian government to commit these crimes. Shell cites to no principle of domestic or international law that would require aiders and abettors to act "under color of law," once it is established that a violation of international law has been committed by a state actor.

Second, even if that were not the case, Plaintiffs have set forth a claim for crimes against humanity based on the pattern of violations described in this complaint. *See infra* § III. Shell does not contest that crimes against humanity. are prohibited when committed by private individuals. Because the discrete violations alleged in this complaint were undertaken in furtherance of the Nigerian government's sustained campaign of crimes against humanity, Plaintiffs are not required to prove state action for their claims of extra-judicial execution, torture, and cruel, inhuman and degrading treatment. *See Kadic*, 70 F.3d at 244 (finding that private individuals can be held liable for

violations normally requiring state action when they are committed in pursuit of crimes such as genocide, war crimes, and crimes against humanity, which do not require state action); *accord Presbyterian Church of Sudan*, 244 F. Supp. 2d at 296, 328.[20]

Third, even if this Court finds that Plaintiffs' violations were not undertaken in furtherance of widespread or systematic attacks against a civilian population, Plaintiffs' have still sufficiently alleged that Shell's acts qualify as state action under this Court's decision in *Kadic*. This court concluded in *Kadic* that state-action violations such as summary execution are violations of international law when committed by individuals acting "under color of law" as well as by formal state actors. 70 F.3d at 243-45.

Furthermore, *Kadic* advised that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Id.* at 244; *see also Estate of Rodriquez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003). Both *Kadic* and the relevant § 1983 jurisprudence confirm that the requirement is not that the defendant be a state *actor*, but that private actors may be responsible for customary international law

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[20] Despite Shell's misleading quotation, SB 27-28, *Flores* also endorsed the established principle that action under color of law is established when a private actor acts jointly or with significant aid from a state actor. 414 F.3d at 244 (citing color-of-law analysis in *Kadic*, 70 F.3d at 245. Plaintiffs have set forth the many ways in which Shell has acted jointly with state actors. *See* § II(C). Nothing in *Flores* overrules *Kadic* 's state action analysis.

violations provided there is sufficient of state *action* involved.

Section 1983 jurisprudence provides that the state action requirement is met when the private actor is a willful participant in a joint action with the state or its agents to deprive another of his or her rights. The *Kadic* court found that the defendant had "acted under color of law insofar as . . . he acted in concert with the former Yugoslavia. . . . A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid."). *Kadic*, 70 F.3d at 245.

The act of aiding and abetting or conspiring with a state actor is sufficient joint action under the § 1983 tests so as to put the aider and abettor's actions under color of law. *See, e.g., Kadic*, 70 F.3d at 245 (finding that appellants "sufficiently alleged that [defendant] acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia . . ."); *Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992); Restatement (Second) of Torts § 876 ("Persons Acting in Concert"). *See also Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (finding that a private actor who conspired to bribe a judge was acting under color of law); *Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980) (holding that allegations that private individuals conspired with and aided and abetted police were sufficient to meet § 1983's color of law requirement and avoid dismissal).

Plaintiffs' allegations of aiding and abetting establish a sufficient nexus with the state to afford liability under international law and domestic law. Although the TVPA included the term "color of foreign

law," the Senate noted that it covered "lawsuits against persons who ordered, abetted, or assisted in the torture." S. Rep. No. 102-249, at 8 (1991). Indeed, the Senate specifically recognized that "[u]nder international law, responsibility for torture, summary execution or disappearances extends beyond the person or persons who actually committed those acts." *Id.* at 9 and n.16. Congress specifically quoted Article 4(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits "*an act by any person which constitutes complicity or participation in torture.*" *Id.* (italics in original). Given that torture requires state action, recognition of aiding and abetting liability in the TVPA demonstrates that such liability extends to private parties who aid and abet government torts even if the tort requires state action.

A number of ATS cases have relied on § 1983 jurisprudence to determine that private parties, including companies, were acting under color of law. *See, e.g., Presbyterian Church*, 244 F. Supp. 2d at 328 (state action where the defendant company, knowing of the Sudanese government's unlawful acts, paid for protection, purchased military equipment, assisted in strategic planning, and allowed military use of its facilities); *Rodriquez*, 256 F. Supp. 2d 1250, 1261 (state action where paramilitaries were acting on behalf of a defendant mining company); *Mujica*, 381 F. Supp. 2d at 1175 (state action where military was acting in furtherance of private interests of oil company in carrying out the bombing of a village).

The state action requirement is met in this case, as Shell and SPDC are alleged to be acting under color of law by jointly participating with state actors[21] in facilitating the execution of Dr. Kiobel and the rest of the Ogoni Nine by bribing witnesses to make false statements, participating in witness preparation sessions where witnesses were told what to say, and otherwise cooperating with the Special Tribunal. J.A. 0128, ¶¶ 3, 65-70. SPDC also specifically requested the assistance of mobile state police forces for security protection, which were known to commit massacres and other human rights violations; provided food, payments, and logistical support to the Nigerian military; imported arms for the military and police whose main function was to facilitate Shell operations in Nigeria; exchanged intelligence with said military and police; and participated in the planning and coordination of security operations by local security forces. J.A. 0128, ¶¶ 37-80. These actions were taken in conjunction with torture, arbitrary arrest and detention, and cruel, inhuman, and degrading treatment to constitute a multi-pronged terror and intimidation campaign against civilians in order to protect Shell property and SPDC's business security in extracting oil in the region. Shell and SPDC willfully conspired with the government and Nigerian military to enact this campaign and facilitated it, including the extra-judicial execution of Dr. Kiobel.

Plaintiffs further allege that Shell was acting "under color of law" to commit torture and cruel,

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[21] Shell confirms that "Major Okuntimo and the Special Tribunal are state actors." SB 27.

inhuman and degrading treatment when they bribed and cajoled witnesses to provide false testimony during the extra-judicial process. J.A. 0139-0140, ¶¶ 70, 76. Plaintiffs also allege that these actions were taken jointly with state actors as part of the overall extra-judicial execution process. J.A. 0144, ¶¶ 88-91. Thus, Plaintiffs have sufficiently stated claims of extra-judicial execution for which Shell can be held liable as a private actor acting under color of law. Additionally, Plaintiffs allege that Shell was acting under color of law when they detained individuals, handed these individuals over to the Nigerian officials, and otherwise acted jointly with state actors to select individuals who would be tortured or otherwise detained in violation of CIDT. J.A. 0119-0127, ¶¶ 6-17, and J.A. 0140, ¶ 76.

D. The Torture Victim Protection Act Does Not Preclude Plaintiffs' Claims Under the ATS.

Plaintiffs' ATS claims are in no way restricted by the TVPA. The law in this Circuit could not be more clear: "The scope of Alien Tort Act remains undiminished by enactment of the Torture Victim Act." *Kadic*, 70 F.3d at 241.[22] Shell's heroic attempts to avoid this holding are fruitless.

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[22] *See also Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 153 (2d Cir. 2003) (recognizing that "the TVPA reaches conduct that may also be covered by the ATCA"); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168-69 (5th Cir. 1999) (considering separately claims under the ATCA and TVPA that are "essentially predicated on the same claims of individual human rights violations"); *Abebe-Jira*, 72 F.3d at 848 (citing the TVPA as confirmation that the

With the exception of two outlier cases,[23] no court since the enactment of the TVPA in 1991 has ever adopted the argument Shell makes here: that the TVPA occupies the field with respect to claims for extra-judicial killing, torture, and cruel, inhuman and degrading treatment, and precludes Plaintiffs from bringing these claims under the ATS.[24] If the TVPA was designed to preempt ATS claims in this area, it would have done so from 1991 on.

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005), the first decision to find that the TVPA preempted the ATS with respect to extra-judicial killings

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ATCA itself confers a private right of action); *Hilao*, 103 F.3d at 778 (noting that the TVPA codifies the cause of action recognized to exist in the ATCA).

[23] *Corrie v. Caterpillar Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) relies on the reasoning of *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), and is currently on appeal.

[24] Plaintiffs have not alleged claims arising under the TVPA. Therefore, Shell's argument that the TVPA does not apply to corporations is not properly before this Court. Moreover, there is nothing in the structure or history of the TVPA that suggests that Congress intended to exclude corporations from liability for torture or extra-judicial killings under the statute. *See* 137 Cong. Rec. S1369-01, 1991 WL 9635, at * 1379. Congress intended the TVPA and its terms to be read in the broadest, rather than more restrictive sense, to allow for the vindication of a broad range of human rights violations committed by a broad range of potential wrongdoers. Indeed, courts have found that corporations can be held liable under the TVPA. *See Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003); *Estate of Rodriquez v. Drummond*, 256 F. Supp. 2d 1250, 1266-67 (N.D. Ala. 2003); *but see Mujica*, 381 F. Supp. 2d at 1175-76 (appeal pending). In any event, whether the TVPA applies to corporations or not does not affect the preemption issue raised by Shell.

and torture, based its decision on faulty reasoning surmising that the TVPA would be "meaningless" if it did not preempt the ATS, when in fact the TVPA had the very explicit purpose of extending the ATS to permit U.S. citizens to bring certain ATS claims in federal court.[25] While the ATS provides jurisdiction over torts brought by aliens only, Congress enacted the TVPA in 1991 specifically to provide a cause of action for American nationals subject to torture or extra-judicial killing in foreign countries. Thus, the entire premise underlying *Enahoro* is faulty. More importantly, *Enahoro* and Shell ignore the overwhelming and explicit evidence that Congress did not intend the TVPA to restrict the ATS in *any* respect.

The TVPA's legislative history demonstrates that Congress' intent was not to limit, but to "enhance the remedy already available" under the ATS by extending it to U.S. citizens. S. Rep. No. 102-249, at 5. The House Report specifically addresses any ambiguity between the two statutes, stating:

> The TVPA would provide such a grant [of an express cause of action], and would also enhance the remedy already available under Section 1350 in an important respect: While the [ATS] provides a remedy to aliens only,

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[25] The particular example the TVPA was based on was the case of Jaime Piopongco, who was one of the plaintiffs in the *Marcos* litigation. He had been tortured and subjected to arbitrary detention during the Marcos regime but by the time of the litigation he had escaped to the United States and taken U.S. citizenship, thus preventing him from making a claim under the ATS. *See Hilao*, 103 F.3d at 791-92.

> the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. Rep. No. 102-376 (I), at 4. The Senate Report on the TVPA virtually mirrors this language. S. Rep. No. 102-249, at 5.

Prior to *Sosa*, courts hearing both ATS and TVPA claims, without exception, allowed both claims to proceed.[26] Nothing in *Sosa* suggests that the TVPA was intended to eradicate claims under the ATS.[27] Indeed,

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[26] *See, e.g., Hilao*, 103 F.3d at 777-78; *Doe v. Islamic Salvation Front*, 993 F. Supp. at 7-9; *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 153 (2d Cir. 2003); *Kadic*, 70 F.3d at 246.

[27] There is absolutely nothing in the text or legislative history of the TVPA which indicates that the TVPA was intended to foreclose claims brought under the ATS. Defendants are in effect arguing that the ATS has, at least in part, been repealed. However, it is well-settled that repeals by implication are disfavored. As the Supreme Court has noted, "[w]here there are two acts upon the same subject, effect should be given to both if possible . . . the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act." *Posadas v. Nat'l City Bank of New York*, 296 U.S.

the *Sosa* Court itself recognized that Congress had not taken any action since the passage of the ATS that "in any relevant way amended § 1350 or limited civil common law power by another statute." *See Sosa*, 542 U.S. at 725. Had the TVPA stripped the ATS of any jurisdiction, the *Sosa* Court would surely have noted this development. Moreover, the *Sosa* Court cited *Filartiga*, a case based on torture and extra-judicial killing, approvingly. 542 U.S. at 731. Under Shell's argument, ATS claims of the type alleged in *Filartiga* – which are the paradigmatic examples of international norms that satisfy the specific, universal and obligatory standard – would not be permitted to proceed. As the dissent in *Enahoro* correctly concluded, "The majority . . . stands *Sosa* on its head." 408 F.3d at 889 (Cudahy, J., dissenting).

Courts after *Sosa* have continued to permit plaintiffs who are bringing both ATS and TVPA claims to proceed on both claims. *See, e.g., Aldana*, 416 F.3d at 1251 (in the absence of "clear and manifest" intent that Congress intended to amend the ATS with the TVPA, the court refused to find that the TVPA provided the exclusive remedy for torture); *Mujica*, 381 F. Supp. 2d at 1179 n.13, *appeal argued* April 19, 2007; *Doe v. Saravia*, 348 F. Supp. 2d at 1144-45; *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005). Accordingly, the TVPA in no way precludes plaintiffs from bringing claims for extra-judicial execution or torture under the ATS.

497, 503 (1936). *See also Branch v. Smith*, 538 U.S. 254, 273 (2003).

Moreover, Shell's argument that the TVPA also precludes a separate cause of action based on cruel, inhuman and degrading treatment, because Congress did not include CIDT in the language of the TVPA, is similarly without merit. Shell can cite nothing in the statutory language or legislative history indicating Congressional disapproval for an ATS claim based on CIDT. Indeed, as this Court has noted, "claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." *Kadic*, 70 F.3d at 241, quoting H.R. Rep. No. 102-367, at 4.[28]

E. Shell is Liable For the Actions of Its Wholly-Owned Subsidiary, SPDC, Under Theories of Agency and Alter Ego Liability.

Shell's argument that they cannot be held liable for SPDC's actions involves disputed factual issues that cannot be resolved in the first instance on appeal. The issues of whether Shell is liable for the actions of its subsidiary based on agency and alter ago theories of liability are not pure legal questions, but factual questions which cannot be decided on the basis of the

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[28] Shell misinterprets *Oliva v U.S. Dep't of Justice*. SB 33. *Oliva* only applies where "a statute makes plain Congress's intent" to supersede customary international law. 433 F.3d 229, 233-34 (2d Cir. 2005). Shell's claim that the TVPA is a "controlling legislative act" is undermined by Congress's intent not to restrict the ATS when it enacted the TVPA.

pleadings. *Cumis Ins. Soc., Inc. v. Peters*, 983 F. Supp. 787, 796 (N.D. Ill. 1997) (agency is question of fact that must survive motion to dismiss if sufficiently pleaded); *Flentye v. Kathrein*, 485 F. Supp. 2d 903, 913 (N.D. Ill. 2007) (motion to dismiss will be denied if complaint fairly alleges facts in support of alter ego theory). These issues were not raised in Shell's petition for permission to appeal and the District Court did not address them in its ruling which was certified for interlocutory appeal. Thus, this Court should not address them in the first instance.

Shell is incorrect in claiming that the issue of its liability for the conduct of SPDC is somehow determinative of subject matter jurisdiction in this case. SB 28-29. The ATS gives the federal courts subject matter jurisdiction "so long as plaintiffs alleged a nonfrivolous claim by an alien for a tort in violation of international law." *Sarei v. Rio Tinto, PLC*, 2007 U.S. App. LEXIS 8430, *4 (9th Cir. 2007). Shell's misleading characterization of Sosa's footnote 20 would lead to the absurd conclusion that whether Plaintiffs have alleged a tort at all depends on whether Plaintiffs succeed in piercing the corporate veil or establishing agency. On the contrary, the plain meaning of footnote 20 taken in context is merely that international law has some norms that apply only to state actors, and other norms that also reach private actors – a fact that has no bearing whatsoever on whether Shell can be held liable for SPDC's conduct. That question is not determinative of subject matter jurisdiction under the ATS.

Shell's claim that it "[has] never conducted any business in Nigeria" is a disputed factual issue and adjudication is improper in this procedural context,

where no evidence of the relationship between Shell and its subsidiaries is before the court. Federal common law agency and veil-piercing rules both provide ample grounds for holding Shell is liable for the acts of its wholly-owned subsidiary, SPDC.

Plaintiffs have sufficiently alleged facts indicating that Shell used SPDC as its agent during the period of SPDC's operations in Nigeria. rendering it liable for SPDC's actions. J.A. 0127-0128, 0143. Amended Complaint ¶¶ 18-25, 83. "It is well established that traditional vicarious liability rules ordinarily make principals . . . vicariously liable for acts of their agents . . . in the scope of their authority." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see also* Restatement (Second) of Agency § 219. In addition, the principal may be liable for the agent's torts even though the agent's conduct is unauthorized, as long as it is within the scope of the relationship.[29] Restatement (Second) of Agency § 216; *see id.* §§ 228-236; *see, e.g., Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974). The Ninth Circuit recently stated that "federal common law agency liability principles" apply in ATS cases involving corporate defendants. *Sarei v. Rio Tinto, PLC*, 2007 LEXIS 8430 at * 19 (9th Cir. 2007),

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[29] Because the ATS is a federal statute providing liability for violations of international law as incorporated into federal law, uniform federal law should determine the appropriate rules of liability, including the traditional rules of agency and the federal common law test for piercing the corporate veil. *See supra* § I (B) (federal common law provides the cause of action in ATS cases).

superseding 456 F.3d 1069, 1078 (9th Cir. 2006).[30] These rules of federal law are consistent with international law, providing an additional basis for their application in ATS cases.[31]

Under an agency theory of liability, the principal and agent may be related corporations, or a parent and subsidiary. *See* Restatement (Second) of Agency reporter's note §14M. In this case, SPDC's employment of Nigerian security forces renders those forces agents not only of SPDC, but also of Shell. J.A. 128, 143. The court in *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1238 (N.D. Cal. 2004), an ATS case also involving claims for human rights violations occurring

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[30] Moreover, the federal common law standards applicable here are also reflected in international law: the concept of agency liability is common to virtually every legal system. *See generally Int'l Agency & Distribution Law* (Dennis Campbell ed.) (2001).

[31] Shell incorrectly claims that "the law of nations does not attach civil liability to corporations under any circumstances." SB 30. In support of this, Shell cites to the founding documents of three entities that apply international *criminal* law. No court has ever accepted the argument that corporations cannot be held liable in ATS suits. "[S]uch a result should hardly be surprising. A private corporation is a juridical person and has no *per se* immunity under U.S. domestic or international law. . . . Given that private individuals are liable for violations of international law in some circumstances, there is no logical reason why corporations should not be held liable." *Presbyterian Church*, 244 F. Supp. 2d at 319 (surveying international precedents); *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005). Additionally, Shell's claim that the Rome Statute requires that an individual cannot be held civilly liable until they have been held criminally liable, SB 31, is simply a provision of that particular treaty and has no basis in customary international law.

in the Niger Delta, properly held that, independently of whether the corporate veil may be pierced, "[a] parent corporation can be held vicariously liable for the acts of a subsidiary corporation if an agency relationship exists between the parent and the subsidiary."

Furthermore, under "[c]ommon law agency principles," a principal is also "liable if it ratifie[s] the illegal acts" of its agent. *Phelan v. Local 305, United Ass'n of Journeymen*, 973 F.2d 1050, 1062 (2d Cir. 1992); *see also Bowoto*, 312 F. Supp. 2d at 1247-48. An intent to ratify a transaction may be inferred, for example, from "a failure to repudiate" an "unauthorized transaction," Restatement (Second) of Agency § 94, or from "acceptance by the principal of benefits of an agent's acts, with full knowledge of the facts." *Monarch Ins. Co. v. Ins. Corp. of Ir., Ltd.*, 835 F.2d 32, 36 (2d Cir. 1987). In the same vein, a principal who defends or covers up the misconduct of an alleged agent embraces that conduct as his own and, thus, ratifies the misconduct. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1388 (9th Cir. 1987); *Bowoto*, 312 F. Supp. 2d at 1247-48.

In addition to the agency theory, Shell is also liable for the acts of SPDC under an alter ego theory of liability. Plaintiffs have sufficiently alleged that Shell dominated and controlled SPDC, providing a legal basis for veil-piercing. *Id.* ¶ 25. Shell wrongly claims that Plaintiffs' allegation of domination and control is merely conclusory. Indeed, the complaint contains numerous specific allegations indicating that Shell acted through SPDC in Nigeria. *See, e.g.*, ¶¶ 22, 33-36, 45-54, 70, 80.

Moreover, federal law "is not bound by the strict standards of the common law alter ego doctrine." *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry.*, 210 F.3d 18, 26 (1st Cir. 2000). "Nor is there any litmus test[.]" *Id.* Instead, "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* In *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) ("*FNBC*"), the Supreme Court held that federal law recognizes a "broad[] equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice. . . .In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies," *id.* at 629-30, irrespective of "whether that was the aim or only the result" of incorporation. *Anderson v. Abbott*, 321 U.S. 349, 363 (1944). The *FNBC* Court also found the same principles in international law, noting that they have been adopted by "courts in the United States and abroad," *FNBC*, 462 U.S. at 628, and quoting an International Court of Justice decision holding that "'lifting the corporate veil'" is appropriate "'to prevent the misuse of the privileges of legal personality . . . to protect third persons . . . or to prevent the evasion of legal requirements or obligations.'" *Id.* at 628 n.20 (quoting *The Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 38-39 (Feb. 5, 1970)).

The Supreme Court held in *Sosa* that, the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," 542 U.S. at 731 n.19. As Justice Breyer noted, those

claims include "torture, genocide, crimes against humanity, and war crimes." *Id.* at 762 (Breyer, J., concurring). Permitting Shell to evade liability for its complicity in violations of international law by refusing to pierce the corporate veil would undermine the very purpose of the ATS to provide a remedy in federal courts for egregious human rights violations of the kind suffered by Plaintiffs here.

III. CRIMES AGAINST HUMANITY CLAIMS ARE ACTIONABLE.

Shell argues that Plaintiffs' claims for crimes against humanity fail to meet the *Sosa* standard for actionable norms, despite the fact that every court to consider the issue after *Sosa* has found that crimes against humanity remain actionable claims under the ATS. *See Sarei v. Rio Tinto, PLC*, 2007 LEXIS 8430, *17-18 (9th Cir. 2007); *Cabello*, 402 F.3d at 1154; *Aldana*, 416 F.3d at 1247; *Mujica*, 381 F. Supp. 2d at 1183; *Presbyterian Church*, 374 F. Supp. 2d at 333-34; *Chavez v. Carranza*, 2006 U.S. Dist. LEXIS 63257, *22 (D. Tenn. 2006).[32]

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[32] Prior to *Sosa*, several courts found crimes against humanity actionable under the ATS under the "specific, universal, and obligatory" standard. *See, e.g., Mehinovic*, 198 F. Supp. 2d at 1344; *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, *27-28 (S.D.N.Y. 2002). Although Restatement (Third) of Foreign Relations Law § 702 does not list crimes against humanity on its list of violations of customary international law, this is because § 702 deals specifically with violations committed by *states*, and each of the predicate acts of crime against humanity (such as torture or murder) are, as noted in § 702, independent violations of international law when committed by states. *See also*

Shell claims that 'crimes against humanity' lacks well-defined content under international law," SB 44, but this argument flies in the face of copious international authorities. All of the international authorities agree that at its core, crimes against humanity requires the commission of specific abuses as part of a "widespread or systematic attack against a civilian population,"[33] which is precisely what Plaintiffs have alleged here. *See, e.g, Cabello*, 402 F.3d at 1161; *Aldana*, 416 F.3d at 1247.[34]

Plaintiffs were subjected to acts including extra judicial executions, arbitrary arrests and detentions, rape, torture, and cruel, inhuman and degrading treatment under color of law, all as part of a widespread and systematic assault by the Nigerian government and its co-conspirators and accomplices,

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id. § 702 reporter's note 1 (stating that the list of violations in this section has as its origin the "crimes against humanity" listed in the Nuremberg Charter).

[33] Shell's attempt to create inconsistent standards by pointing to missing words in the tribunal statutes is disingenuous. While the ICTY may not use the words "widespread or systematic" in its statute, ICTY decisions have consistently recognized this requirement. *See, e.g., Prosecutor v. Tadic*, No. IT-94-1 ¶ 248 (Nov. 30, 2005) (finding that "the act of the accused must comprise part of a pattern of widespread or systematic crimes directed at a civilian population"). Shell can point to no contrary decision.

[34] Indeed, Shell's own authority recognizes that crimes against humanity is part of customary international law and states that a comparison between the definitions evidences only "slight differences between them." M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 Transnat'l L. & Contemp. Probs. 199, 212 (1998).

Shell and SPDC, against the civilian population of the Niger Delta. J.A. 0128, ¶¶ 90-94. Plaintiffs, as civilians opposed to Shell and SPDC's abysmal human rights and environmental abuses in the region, constitute an identifiable civilian population. Shell and SPDC cooperated with, conspired with, and aided and abetted Nigerian security forces and the Special Tribunal in carrying out this widespread and systematic attack over a period of several years throughout Rivers State, including the massacre, torture, arbitrary arrest, and administration of extra-judicial punishments on hundreds of people who were allegedly threats to public order. J.A. 0128, ¶¶ 3, 90-94.

Shell's attempt to use various international authorities to create the appearance of varying definitions of crimes against humanity fails. SB 45-46. International tribunals have not adopted varying definitions of crimes against humanity. The fact that some additional jurisdictional requirements have been added to some statutes proscribing crimes against humanity, such as ensuring that the crime was committed on "national, political ethnic, racial, or religious grounds" (ICTR) or requiring that the crime be committed in the course of "armed conflict" (ICTY) does not detract from the core customary law definition of crimes against humanity. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479-82 (S.D.N.Y. 2005) (holding that "[t]he ICTY Statute's requirement that the crimes be 'committed in armed conflict' . . . is merely a 'jurisdictional element' that must be satisfied for the ICTY to assume jurisdiction over a case") (citing *Prosecutor v. Tadic*, No. IT-94-1-A, ¶ 249 (Appeals Chamber, July 15, 1999)); *Prosecutor v. Kamuhanda*, No. ICTR-95-54A-T,

¶ 671 (Trial Chamber, Jan. 22, 2004) (noting that the jurisdictional element of requiring that crimes be committed on "national, political, ethnic, and racial or religious grounds," is "not intended to alter the definition of Crimes against Humanity in international law").[35]

These jurisdictional elements have no bearing on the core definition of crimes against humanity. *Prosecutor v. Krajisnik*, No. IT-00-39-T, ¶ 704 (Trial Chamber, Sept. 27, 2006); *Kamuhanda*, No. ICTR-95-54A-T, at ¶ 671.

IV. CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIMS ARE ACTIONABLE.

Shell does not contest that the District Court correctly found that torture satisfies the Sosa standard for norms actionable under the ATS, nor can they. J.A. 0015-0016.[36] Shell does, however, attempt to argue

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[35] Additionally, that the ICTY and the ICTR do not include "enforced disappearance of persons" and the "crime of apartheid" among their enumerated underlying offenses is not, as Shell claims, evidence of an inconsistent standard; these particular crimes were simply not at issue in the Rwandan and Yugoslav conflicts, nor are they relevant here.

[36] As this Court stated in *Filartiga v. Pena-Irala*, "While the ultimate scope of [internationally protected human] rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. . . . Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." 630 F.2d at 885, 890. *See also Kadic*, 70 F.3d at 244 (holding that torture constitutes universally recognized peremptory norm of international law).

that the prohibition against CIDT does not satisfy the *Sosa* standard. SB 38 n.15. This argument should not be accepted.

"[C]ruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not serve the same purpose as 'torture.'" *Mehinovic*, 198 F. Supp. 2d at 1348; *see also* Restatement (Third) of Foreign Relations Law § 702, reporters' note 5 (1987).[37]

Courts have routinely recognized cruel, inhuman, or degrading treatment as a discrete and well-recognized violation of customary international

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[37] Indeed, all of the world's omnibus human rights instruments prohibit cruel, inhuman or degrading treatment. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, art. 16, June 26, 1987, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, art. 7, Mar. 23, 1976, 999 U.N.T.S. 171; American Convention on Human Rights, art. 5 (2), July 18, 1978, 1144 U.N.T.S. 123. In addition to the numerous international legal instruments codifying the universal prohibition against cruel, inhuman and degrading treatment, this conduct is further proscribed by the major international criminal tribunals under the laws of war, including the International Criminal Court, Rome Statute of the International Criminal Court, 37 I.L.M. 999, 1006-09 (1998), arts. 8(2)(a)(ii), 8(2)(b)(xxi); the International Criminal Tribunal for the Former Yugoslavia, Statute of the International Criminal Tribunal for Yugoslavia, art. 2, SC Res. 827 (May 25, 1993); and the International Criminal Tribunal for Rwanda, Statute for the International Criminal Tribunal for Rwanda, art. 4, SC Res. 955 (Nov. 8, 1994) each of which provide for prosecution of cruel, inhuman and degrading treatment as a violation of international law.

law and have, thus, found it to be a separate ground for liability under the ATS. *See Abebe-Jira*, 72 F.3d at 846-47; *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1325 (N.D. Cal. 2004); *Mehinovic*, 198 F. Supp. 2d at 1347-49; *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437-38 (S.D.N.Y. 2002); *Estate Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001); *Xuncax*, 886 F. Supp. at 186.[38]

Plaintiffs here suffered clubbing, horsewhipping, denial of food, water, and medical attention, injection of life-threatening chemicals, threats to the lives of family members, and the raping, beating, and killing of family members, all of which constitute torture and cruel, inhuman, and degrading treatment ("CIDT") under customary international law. J.A. 0128, ¶ 6-15, 62-64. Plaintiffs were subjected to such treatment both in and outside of detention, and some were submitted to torture and CIDT in detention until they signed (or for not signing) documents pledging they would no longer participate in protests against Shell and SPDC operations in Ogoni. J.A. 0128, ¶¶ 10-13. Some members of the plaintiff class were subjected to torture and CIDT to the point that the treatment led to their

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[38] *Aldana* however, declined to find that CIDT claims were actionable under the ATS and rejected the reasoning of *Mehinovic* and *Cabello* because they both relied on the ICCPR and the ICCPR, which the court found did not "create obligations enforceable in the federal courts." 416 F.3d at 1447 (quoting *Sosa's* statement that the ICCPR "did not 'create obligations enforceable in the federal court.' *Sosa*, 542 U.S. at 735). The *Aldana* court appears to have misunderstood the relevance of the ICCPR, not as binding international law, but as evidence that a prohibition constitutes a customary international law norm and commands widespread acceptance.

death. J.A. 0128, ¶ 10. The Restatement (Third) of Foreign Relations Law makes clear that the prohibition against CIDT is a norm of customary international law. *See* § 702(d) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment."). These allegations adequately state CIDT claims.

The District Court correctly found that Plaintiffs' allegations were sufficient to state a claim for torture and that it was, therefore, unnecessary to reach the issue of CIDT. J.A. 0016 n.11. However, to the extent that Plaintiffs' allegations do not rise to the level of torture, they certainly establish physical suffering, anguish, humiliation, fear and debasement, thereby bringing Plaintiffs' claims squarely within the core definition of CIDT. *See Xuncax*, 886 F. Supp. at 187 ("It is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman or degrading treatment' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law. . . ."); *see also Liu Qi*, 349 F. Supp. 2d at 1322 (affirming the *Xuncax* approach and finding it to be "entirely consistent with *Sosa*.").

V. ARBITRARY ARREST AND DETENTION CLAIMS ARE ACTIONABLE.

The prohibition of prolonged arbitrary detention is one of the most fundamental of all human rights.[39] The Universal Declaration of Human Rights states that "[n]o one shall be subjected to arbitrary arrest [or] detention." G.A. Res. 2/7A (III) UN Doc. A/810, art. 9 (1948). The International Covenant on Civil and Political Rights also affirms that "[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Dec. 19, 1966, 999 U.N.T.S. 171, art. 9 (1) (entered into force Mar. 23, 1976); *see also* African Charter on Human and Peoples' Rights, art. 6; American Convention on Human Rights, art. 7(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5; *Hostages Case* (U.S. v. Iran), 1979 I.C.J. 7, 42 ("Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."); *Winterwerp Case*, 33 Eur. Ct. H.R., (ser. A) ¶ 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as 'lawful.'").

Contrary to Shell's claim, a claim for arbitrary arrest and detention does not "fall well short of the

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[39] Restatement (Third) of Foreign Relations, § 702, note 11 ("Not all human rights norms are *jus cogens*, but [arbitrary detention has] that quality.").

level of specificity required by *Sosa*." SB 49. The Court's holding in *Sosa* was limited to the detention claim in that case: "It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." 542 U.S. at 738. Indeed, post-*Sosa*, courts have found that arbitrary detention claims are actionable under the ATS. *See, e.g., Liu Qi*, 349 F. Supp. 2d at 1326 (finding that plaintiffs who were detained for three or more days without an opportunity to see a family member or lawyer and were tortured met the definition of arbitrary detention).

The Amended Complaint establishes that ten Plaintiffs were subjected to arbitrary arrest and detention, and all but one of them suffered arbitrary detention of more than one day. J.A. 0128, ¶¶ 6-15. Additionally, unlike Dr. Alvarez in *Sosa*, they were never formally charged with a crime, were never formally arraigned, and were incarcerated without food, water, or medical attention, often in military detention camps without access to lawyers. *Id.* Moreover, these detentions and arrests were specifically intended to suppress dissent and violate individual rights. Most of these Plaintiffs were tortured and detained under degrading conditions for days, weeks, months, and years.[40] J.A. 0128, ¶¶ 6-15, 62-64.

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[40] Shell's argument that Plaintiffs have not alleged a state policy or "referred to any settled definition of 'prolonged' arbitrary detention" is frivolous. SB 49. Plaintiffs have clearly alleged that the Nigerian government committed these violations pursuant to a policy of securing the oil fields. *See, e.g.*, J.A. 0117, 0120-121,

Prolonged arbitrary detention such as this has been recognized as a norm which meets the "specific, universal and obligatory" standard endorsed by the *Sosa* Court. *See Hilao*, 103 F.3d at 794; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

CONCLUSION

For all of the foregoing reasons, the District Court's Order dismissing Plaintiffs' extra-judicial execution claims should be reversed and the other decisions in the Order before this Court should be affirmed. Plaintiffs' claims should be remanded to the District Court for trial.

Dated: July 6, 2007

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0125-126. Moreover, the length of detention, particularly here, where Plaintiffs endured torture and other degrading treatment, clearly satisfies the prohibition against arbitrary detention. *See also* Restatement (Third) of Foreign Relations, § 702, cmt. h ("Detention is arbitrary if . . . 'it is incompatible with the principles of justice or with the dignity of the human person.'")

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA individually and on behalf of his late father, CLEMENT TUSIMA,
Plaintiffs-Appellants-Cross-Appellees,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,
Defendants-Appellees-Cross-Appellants,

and

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

(Caption continued)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. KIOBEL TRIVIALIZES *SOSA* AND MISCONSTRUES THE SHELL PARTIES' ARGUMENT. 2

A. *Sosa* Requires that the Law of Nations Contain a Specific Norm Reaching the Conduct of a Defendant 2

B. Kiobel Misunderstands Federal Common Law. 5

II. NO SUBJECT-MATTER JURISDICTION EXISTS OVER KIOBEL'S CLAIMS. 7

A. Kiobel Ignores Controlling Law 7

B. The Law of Nations Contains No Norm Reaching the Shell Parties' Conduct. 8

C. Subject-Matter Jurisdiction Would Be Absent Even Were Domestic Law Relevant. 10

III. KIOBEL'S EXTRAJUDICIAL KILLING, TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIMS DO NOT SURVIVE THE TVPA. 12

IV. KIOBEL HAS NOT SATISFIED THE STATE ACTION REQUIREMENT 17

A. State Action is Required Because Kiobel Has Not Alleged Genocide or War Crimes. 18

B. The Acts of the Nigerian Government Do Not Satisfy the State Action Requirement. 18

C. Domestic "Color of Law" Jurisprudence Is Irrelevant to the Liability of the Shell Parties, and Would Not Support Their Liability Even if Relevant. 19

D. The Shell Parties Did Not Act Under "Color of Law". 21

V. KIOBEL'S CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIM SHOULD BE DISMISSED. 22

VI. KIOBEL'S "CRIMES AGAINST HUMANITY" CLAIM SHOULD BE DISMISSED. 26

VII. KIOBEL'S "ARBITRARY ARREST AND DETENTION" CLAIM SHOULD BE DISMISSED. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Abebe-Jira v. Negewo,
72 F.3d 844 (11th Cir. 1996) 15, 23

Aldana v. Del Monte Fresh Produce, N.A. Inc.,
416 F.3d 1242 (11th Cir. 2005) ..... *passim*

Am. Protein Corp. v. AB Volvo,
844 F.2d 56 (2d Cir. 1988) 11

Arnold v. I.B.M.,
637 F.2d 1350 (9th Cir. 1981) 22

Beanal v. Freeport-McMoran, Inc.,
197 F.3d 161 (5th Cir. 1999) 15

Bigio v. Coca-Cola Co.,
239 F.3d 440 (2d Cir. 2001) 19

Bowoto v. Chevron Texaco Corp.,
312 F. Supp. 2d 1229 (N.D. Cal. 2004) 8, 11

Cabello v. Fernandez-Larios,
402 F.3d 1148 (11th Cir. 2005) 23

Cantrell v. Forest City Publ'g Co.,
419 U.S. 245 (1974) 11

Dennis v. Sparks,
449 U.S. 24 (1980) 21

Doe v. Exxon Mobil Corp.,
393 F. Supp. 2d 20 (D.D.C. 2005) 21

Doe v. Islamic Salvation Front,
257 F. Supp. 2d 115 (D.D.C. 2003) 16

Doe v. Islamic Salvation Front,
993 F. Supp. 3 (D.D.C. 1998) 16

Doe v. Liu Qi,
349 F. Supp. 2d 1258 (N.D. Cal. 2004) 24

Estate of Cabello v. Fernandez-Larios,
157 F. Supp. 2d 1245 (S.D. Fla. 2001) 23

Estate of Rodriquez v. Drummond,
256 F. Supp. 2d 1250 (N.D. Ala. 2003) 21

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 2, 7, 14

Flores v. S. Peru Copper Corp.,
414 F.3d 233 (2d Cir. 2003) ..... *passim*

Forti v. Suarez-Mason,
672 F. Supp. 1531 (N.D. Cal. 1987) 4

Fries v. Barnes,
618 F.2d 988 (2d Cir. 1980) 21

Gallagher v. Neil Young Freedom Concert,
49 F.3d 1442 (10th Cir. 1995) 22

Ginsberg v. Healey Car & Truck Leasing, Inc.,
189 F.3d 268 (2d Cir. 1999) 22

Hilao v. Estate of Marcos,
103 F.3d 767 (9th Cir. 1996) 15, 16

In re Agent Orange Prod. Liab. Litig.,
373 F. Supp. 2d 7 (S.D.N.Y. 2005) 9

In re Schulman Transport Enter., Inc.,
744 F.2d 293 (2d Cir. 1984) 11

In re Sinaltrainal Litig.,
474 F. Supp. 2d 1273 (S.D. Fla. 2006) 20

Jazini v. Nissan Motor Co.,
148 F.3d 181 (2d Cir. 1998) 10

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995) ..... *passim*

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 21

Mehinovic v. Vuckovic,
198 F. Supp. 2d 1322 (N.D. Ga. 2002) 23

Meyer v. Holley,
537 U.S. 280 (2003) 11

Mujica v. Occidental Petroleum Corp.,
381 F. Supp. 2d 1164 (C.D. Cal. 2005) 20, 21

Olin Corp. v. Ins. Co. of North America,
221 F.3d 307 (2d Cir. 2000) 19

Oliva v. United States Dep't. of Justice,
433 F.3d 229 (2d Cir. 2005) 12

Posadas v. Nat'l City Bank of New York,
296 U.S. 497 (1936) 12

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
244 F. Supp. 2d 289 (S.D.N.Y. 2003) 8, 21

Saleh v. Titan Corp.,
436 F. Supp. 2d 55 (D.D.C. 2006) 21

Sarei v. Rio Tinto, PLC,
487 F.3d 1193 (9th Cir. 2007) 7

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) ..... *passim*

Spear v. Town of West Hartford,
954 F.2d 63 (2d Cir. 1992) 21

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 6

The Nereide,
13 U.S. 388 (1815) 12

The Paquete Habana,
175 U.S. 677 (1900) 12

United States v. Bestfoods,
524 U.S. 51 (1998) 10

United States v. Iran,
1980 I.C.J. 3 (May 24) 29

United States v. Yousef,
327 F.3d 56 (2d Cir. 2003) 24

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995) 23

Statutes

28 U.S.C. § 1350 ..... *passim*

42 U.S.C. § 1983 ..... 20, 21

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28 U.S.C. § 1350 note ..... *passim*

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136 Cong. Rec. S17486-01 (1990) 25

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art. 5(2), Nov. 22, 1969, 9 I.L.M. 673 25

H.R. Rep. No. 102-367 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84 13

Orentlicher, Diane F., *Settling Accounts*, 100 Yale L.J. 2537 (1991) 27

Restatement (Third) of Foreign Relations Law
§ 702 ..... 24, 28, 30

S. Rep. No. 102-249 (1991) 14

PRELIMINARY STATEMENT

Kiobel would limit *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) to the proposition that detentions of less than a day do not violate the law of nations. *Sosa* stands for much more. *First*, *Sosa* holds that the ATS is jurisdictional only, and that no jurisdiction exists unless a "claim based on the present-day law of nations [rests] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized". *Id.* at 724, 725. *Second*, if the defendant "is a private actor such as a corporation", the international norm must specifically "extend[] the scope of liability" to such an actor. *Id.* at 732 n.20. *Third*, ATS jurisdiction reaches a "very limited category" of claims; is limited to a "narrow set of violations . . . threatening serious consequences in international affairs"; must be subject to "a restrained conception of the discretion of a federal court" and "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred" by the ATS; is subject to a "high bar" for any expansion; and has "no congressional mandate . . . [for] greater judicial creativity" for any expansion. *Id.* at 713, 715, 725, 727, 728.

Although Kiobel asserts the claims against the Shell Parties "easily satisf[y]" *Sosa*, no specific, universally accepted norm of customary international law exists that would condemn the Shell Parties' alleged acts. The issue is not whether Kiobel can maintain an action in federal court against Nigerian military officers; that case would be like *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) or *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). *Sosa* does not

permit courts to ask that question and then turn to general rules of secondary liability drawn from domestic or international law to impose secondary liability on private actors.

ARGUMENT

I. KIOBEL TRIVIALIZES *SOSA* AND MISCONSTRUES THE SHELL PARTIES' ARGUMENT.

Kiobel skirts the Shell Parties' principal argument: unless specific, universally accepted norms of the law of nations extend liability to the actions the Shell Parties have allegedly committed, the ATS provides no jurisdiction. Kiobel continues to press a different theory: general principles of United States or foreign domestic law concerning secondary liability hold the Shell Parties liable for the acts of the Nigerian government. *Sosa* forecloses that argument.

A. *Sosa* Requires that the Law of Nations Contain a Specific Norm Reaching the Conduct of a Defendant.

Relying on the "case citations and parentheticals accompanying" footnote 20 of *Sosa*, Kiobel attempts to sweep away the Court's directive, saying that it concerns only the difference between state actors and private actors, and asserting that the footnote affirms *Kadic*'s reliance on Section 1983 jurisprudence as relevant to "state action" liability under the law of nations. That interpretation is not intelligible, let alone plausible.

First, footnote 20 is part of the Court's holding that the law of nations determines what acts and actors may be held liable under the ATS:

> "And the determination whether a norm is sufficiently definite to support a cause of action[20] . . .
>
> [20] A related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."

Sosa, 542 U.S. at 732 & n.20 (emphasis added). That directive is not limited by a "*compare*" giving two cases as an example.

Second, *Sosa* noted that unless "Sosa was acting on behalf of a government when he made the arrest, . . . he would need a rule broader still". 542 U.S. at 737. The "rule" referred to would have to constitute "a binding *customary norm* today". *Id.* at 736 (emphasis added). Kiobel also ignores Justice Breyer's concurrence, which reemphasized the Court's directive: "The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." *Id.* at 760.

Third, Kiobel's distinction is meaningless. The law of nations principally concerns the relationship of nations to each other, *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249-50 (2d Cir. 2003), and reaches private actors for only a "narrow set of violations". *Sosa*, 542 U.S at 715. Extending ATS jurisdiction to reach claims beyond the paradigmatic three offenses

against a corporation or individual necessarily raises the question of state action, but in the context of the rule set out by *Sosa*: the law of nations governs both the "what" and the "who".

Fourth, *Sosa* does not "reaffirm" *Kadic*'s use of Section 1983 jurisprudence, it rejects it by requiring that international law determine whether liability extends "to the perpetrator being sued". *Id.* at 732 n.20. The sole case cited by *Kadic* relying on Section 1983 was *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987)—a case explicitly denounced by *Sosa*. *See Sosa*, 542 U.S. at 736 n.27. Although Kiobel relies on *Kadic* for the proposition that "the 'specificity' requirement has nothing to do with the liability of private parties under international law", *Kadic* contains no such statement. *Id.* at 240.

Kiobel also argues that the Shell Parties' position would bar all causes of action unless, for example, a norm prevented the precise means of torture used. (Reply Brief for Plaintiffs-Appellants-Cross-Appellees ("KRB") 14-15.) That is not our argument. The Shell Parties ask simply what the Supreme Court has directed: if the Shell Parties are to be held liable for SPDC's alleged provision of munitions to Nigeria, there must be a specific, universally accepted norm in the law of nations that prohibits the Shell Parties' alleged conduct. That norm would not need to specify the model numbers of rifles.

B. Kiobel Misunderstands Federal Common Law.

Kiobel relies on *Sosa*'s references to the common law "provid[ing] a cause of action for the modest

number of international law violations with a potential for personal liability at the time", KRB 6-7 (quoting *Sosa*, 542 U.S. at 724), and leaps to the conclusion that "*Sosa* directs that federal common law principles determine the other issues, including available theories of liability and defenses . . .". (KRB 10.) Nothing in *Sosa* supports that conclusion.

First, *Sosa*'s holding that the ATS is jurisdictional only, followed by its conclusion that Congress "enacted [it] on the understanding that the common law would provide a cause of action", *Sosa*, 542 U.S. at 724, does not imply that the substantive elements of the claims or defenses are provided by federal common law rather than the law of nations. *Sosa* says the opposite when, although agreeing with the dissent's observation that the conception of federal common law has changed substantially in the last 200 years, it rests its holding on the ability of the courts to recognize "enforceable *international* norms" subject to "vigilant doorkeeping". 542 U.S. at 729-30 (emphasis added). *Sosa* allows courts to "derive some substantive law in a common law way" because "the domestic law of the United States recognizes the law of nations". *Id.* at 729. *Sosa* contains no suggestion that claims or defenses actionable under the ATS may refer to substantive domestic law.

Second, *Sosa* looked exclusively at customary international law to determine whether Alvarez himself committed acts that violated the law of nations. (Brief of Appellees/Cross-Appellants ("SB") 11-19.) When this Court has considered a claim brought under the ATS against individuals and not states, it has assessed the alleged conduct of those individuals in light of defined international norms. (*Id.*) If a "core" of

the law of nations condemns torture, KRB 52 n.36, that "core" does not establish a norm prohibiting the subsidiary of a corporation from, for example, requesting police assistance or paying for it if the police are engaged in torture.

Third, quoting Judge Edwards's concurrence in *Tel-Oren*, Kiobel argues that *Sosa* does not require, as a predicate to suit under the ATS, that there be "international accord on a right to sue". (KRB 7.) Although that question remains open after *Sosa*, *see* 542 U.S. at 762 (Breyer, J., concurring), the Shell Parties have not made that argument; here, we have argued only that the specific, universally accepted norm must reach the defendants' alleged acts.

II. NO SUBJECT-MATTER JURISDICTION EXISTS OVER KIOBEL'S CLAIMS.

No definite, uniformly agreed-upon norm of the law of nations would hold the Shell Parties liable for the alleged acts of SPDC. Therefore, the ATS does not confer jurisdiction over Kiobel's claims. Kiobel begins by ignoring controlling law from this Court, continues by claiming that facts determining subject-matter jurisdiction cannot be considered on appeal, and concludes that domestic veil-piercing and alter ego law should be incorporated into the law of nations to avoid "undermin[ing] the very purpose of the ATS". (KRB 48.) Those propositions are groundless.

A. Kiobel Ignores Controlling Law.

Kiobel relies on *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1200-01 (9th Cir. 2007), for the proposition that "[t]he ATS gives the federal courts subject matter

jurisdiction 'so long as plaintiffs alleged a nonfrivolous claim'". (KRB 43.) However, this Court rejected that standard in *Kadic* and *Filartiga*. (*See* SB 3.) In *Kadic*, the Court held that the ATS "requires a more searching review of the merits to establish jurisdiction . . . . [I]t is not a sufficient basis of jurisdiction to plead merely a colorable violation of the law of nations." *Kadic*, 70 F.3d at 238. Kiobel likewise complains that whether the Shell Parties (as opposed to SPDC) have ever taken any action in Nigeria "is a disputed factual issue and adjudication is improper in this procedural context". (KRB 43.) Kiobel's assertion directly contradicts *Flores*'s holding that "reference to evidence outside the pleadings" is proper. (*See* SB 3-4.) Kiobel has completed discovery, and has no evidence contradicting the affidavits submitted by the Shell Parties stating that they have never taken any actions in Nigeria. (*See* SB 1-3.)

B. The Law of Nations Contains No Norm Reaching the Shell Parties' Conduct.

To state a claim against the Shell Parties, Kiobel must identify some specific, universally accepted norm of customary international law that would extend liability "to the perpetrator being sued". *Sosa*, 542 U.S. at 732 n.20. Veil piercing and agency liability go to the heart of "who" can be held liable for a violation of the law of nations, and thus must be determined by the law of nations. *See id.* United States domestic veil-piercing law and agency law are irrelevant.[1]

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[1] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308-19 (S.D.N.Y. 2003), and the cases it cites

Subject-matter jurisdiction exists only if the law of nations extends liability to the Shell Parties for the alleged acts of SPDC that occurred solely in Nigeria, where the Shell Parties have no operations. (*See* SB 1-2, 28-29.) It does not. Putting aside the allegations indiscriminately pleading that the Shell Parties "and/or SPDC" took actions in Nigeria, the only relevant allegations in the Amended Complaint are:

> The Shell Parties, "through [their] wholly owned subsidiaries, including SPDC, [are] major investor[s] in Nigeria and explore[] for, produce[] and sell[] energy products derived from Nigerian oil and natural gas", JA 0127, ¶ 22; *see also* JA 0130, ¶ 35;
>
> "Since operations began in Nigeria in 1958, [the Shell Parties have] dominated and controlled SPDC", JA 0128, ¶ 25; and

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suggesting that corporations may be held liable under the ATS all predate *Sosa*. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1236 (N.D. Cal. 2004), which also predates *Sosa*, expresses uncertainty about whether corporate liability would be determined by state or federal law, when *Sosa*'s answer is "neither". *In re Agent Orange Prod. Liab. Litig.* recognized "there is substantial support" for the argument that corporations cannot be liable under international law. 373 F. Supp. 2d 7, 54-55 (S.D.N.Y. 2005). In the face of such "substantial support", *Sosa* does not permit "close questions" to be resolved in favor of finding a new norm of the law of nations. *See* 542 U.S. at 724-25. None of the cases cited by Kiobel examined the consistent "customs and practices of states", *Flores*, 414 F.3d at 250, to determine whether civil corporate liability may exist for the types of acts alleged here.

> "On or about February 15, 1993 through February 18, 1993, [the Shell Parties] and SPDC officials met in the Netherlands and England to formulate a strategy to suppress MOSOP and to return to Ogoniland", JA 0132, ¶ 45.

Kiobel has cited no specific, well-settled norm of the law of nations that would impose liability on the Shell Parties based on those allegations.[2] Instead, Kiobel attempts to transfer the burden onto the Shell Parties, arguing that the international law consensus refusing to impose criminal liability on corporations is not dispositive of the question of civil liability.

C. Subject-Matter Jurisdiction Would Be Absent Even Were Domestic Law Relevant.

Although *Sosa* requires that the Shell Parties' liability be determined solely by international norms, no subject-matter jurisdiction would exist even if domestic law pertained. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Allegations like

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[2] Even if "the concept of agency liability is common to virtually every legal system", KRB 44 n.30, that would not establish a specific, universally accepted norm sufficient to hold the Shell Parties liable through SPDC. For example, "many nations recognize a norm against arbitrary detention, *but that consensus is at a high level of generality*". *Sosa*, 542 U.S. at 736 n.27 (emphasis added).

Paragraph 25 of the Amended Complaint, which merely repeat the legal standard for agency, are insufficient. *See Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998). The agency cases cited by Kiobel, KRB 44-46, do not support a finding of an agency relationship under the facts Kiobel has pleaded.[3] Indeed, an "essential characteristic of an agency relationship"—that SPDC acted pursuant to the Shell Parties' "direction and control" in the conduct complained of—is not present in Kiobel's factual allegations. *See In re Schulman Transport Enter., Inc.*, 744 F.2d 293, 295 (2d Cir. 1984).

As to the alter ego doctrine, there are no allegations sufficient to support such a theory. Corporate separateness is presumed to have "substantial weight" in an alter ego analysis. *See Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988). Contrary to Kiobel's assertions, KRB 47-48, the "very purpose" of the ATS had nothing to do with indirect corporate liability, or even any of the "egregious human rights violations" of which Kiobel complains. Unless the Shell Parties have violated a specific, universally recognized norm of the law of nations, no "fraud or injustice" would create subject-

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[3] *See, e.g., Meyer v. Holley*, 537 U.S. 280, 286 (2003) (finding no agency relationship); *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974) (publishing company vicariously liable for libel by employee acting within the scope of employment); *Bowoto*, 312 F. Supp. 2d at 1242-46 (plaintiffs' "laundry list" of allegations regarding parent's control of subsidiary, including overlapping officers and directors, integrated monitoring team, and extraordinarily close relationship, sufficient to withstand motion to dismiss).

matter jurisdiction where it otherwise would not exist through the alter ego doctrine or otherwise.

III. KIOBEL'S EXTRAJUDICIAL KILLING, TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIMS DO NOT SURVIVE THE TVPA.

Kiobel argues that the TVPA did not impliedly repeal the ATS. That is true but irrelevant. Kiobel ignores *Sosa*'s holding that the ATS "is a jurisdictional statute creating no new causes of action". 542 U.S. at 724. The cases Kiobel cites, such as *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936), concern the implied repeal of one legislative act by another "upon the same subject". The law of implied repeals is not relevant here, because the ATS creates no rights; it is jurisdictional only, "enabl[ing] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law". *Sosa*, 542 U.S. at 712.

As explained in our opening brief, the courts do not look to customary international law when Congress "speaks to" an issue (or when a treaty is in force). (SB 32-33.) The TVPA provides a statutory cause of action for adjudication of claims for torture and extrajudicial killing. Indeed, Kiobel's response to the line of authority beginning with *The Nereide*, 13 U.S. 388 (1815) and continuing on to *The Paquete Habana*, 175 U.S. 677 (1900) and *Oliva v. United States Department of Justice*, 433 F.3d 229 (2d Cir. 2005)—that "*Oliva* only applies where 'a statute makes plain Congress' intent' to supersede customary international law", KRB 42 n.28—is a sheer fabrication. Kiobel has added the words "to supersede customary international law"

although none of those cases says that. Instead, those cases hold that the courts may resort to the law of nations only when no statute "speaks to" an issue. Those cases impose no requirement that Congress intended to supersede customary international law, or even knew that it was doing so.[4]

Kiobel's other arguments are likewise meritless. *First*, the very portion of the House Report cited by Kiobel and by the Shell Parties states that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by the ATS]. That statute should remain intact to permit suits based on *other norms* that already exist or may ripen in the future into rules of customary international law". H.R. Rep. No. 102-367, at *4 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84 (emphasis added); *see* SB 35; KRB 39. Congress stated that the ATS would remain intact to cover "other norms", *i.e.*, norms concerning claims not "based on torture or summary executions". *See also* S. Rep. No.

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[4] Kiobel relies on *Sosa*'s statement that Congress has not "amended § 1350 or limited civil common law power by another statute" to argue that the TVPA did not "impliedly repeal" the ATS. (KRB 40.) *Sosa* did not address whether torture or extrajudicial killing claims could be brought under the ATS after the adoption of the TVPA; in the quoted language, the Court explained that Congress had not "categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law". *Id.* at 725; *see also id.* at 731. The TVPA's enactment automatically eliminated the covered claims from ATS jurisdiction without any amendment to Section 1350 or statutory limitation of the courts' common law power. (*See* SB 32-33.)

102-249, at *4 (1991) ("[The ATS] has *other* important uses and should not be replaced" (emphasis added)).

Second, Kiobel relies on snippets of *dicta* taken from *Flores* and *Kadic* while disregarding the holdings of those cases and the context of the *dicta*. *Flores* did not involve claims of torture, extrajudicial killing or cruel, inhuman and degrading treatment. The language from *Flores* on which Kiobel relies ("The TVPA reaches conduct that may also be covered by the [ATS]") is part of this Court's explanation that the TVPA "codified" *Filartiga* and statutorily extended its remedy to U.S. citizens. 414 F.3d at 246-247. That language contains no suggestion that after the TVPA's adoption, claims for torture may nevertheless be brought under customary international law instead of or in addition to claims under the TVPA.[5] In *Kadic*, no argument was made that the TVPA's enactment barred claims for torture under the ATS; instead, Karadzic argued that the TVPA's adoption demonstrated that Congress intended to graft a state-action requirement onto *all* ATS claims, which argument this Court rejected, concluding with the language relied on by Kiobel ("The scope of the Alien Tort Act remains undiminished by the enactment of the [TVPA]"). 70 F.3d at 241. The immediately preceding discussion

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[5] Kiobel similarly argues that *Sosa*'s approving citation of *Filartiga* means that the TVPA does not displace actions for torture or extrajudicial killing under the law of nations. (KRB at 40.) However, *Sosa*'s citation of *Filartiga* is for the proposition that in passing the TVPA, Congress agreed with *Filartiga* that the "proper exercise of judicial power" can extend to torture occurring in foreign countries, and that the TVPA "supplement[ed] the judicial determination in some detail". 542 U.S. at 731.

is of the House Report, rejecting Karadzic's argument because of the "other norms" language in that Report. *Id.*

Third, the other cases upon which Kiobel relies are equally unconvincing. (KRB 37 n.22, 40 n.26.) In *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996),[6] and *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996),[7] the courts never considered whether ATS claims for torture were displaced by the TVPA. Kiobel cites *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998), as "allow[ing] both [ATS and TVPA] claims to proceed", KRB at 39-40; in a subsequent decision, the court held that the TVPA "is clearly inapplicable here", *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.11 (D.D.C. 2003).

Finally, Kiobel ignores the problem that its position requires belief in an absurd Congressional intent. (*See* SB 36.) Congress cannot have intended that United States citizens must first attempt foreign remedies while aliens need not. In a nonsequitur,

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[6] *Abebe*'s conclusion that "the [ATS] confers both a forum and a private right of action", 72 F.3d at 848, does not survive *Sosa*. *Abebe* rests on several cases holding that "all that the statute requires is that an alien plaintiff allege that a 'tort' was committed 'in violation' of international law or treaty of the United States'", *id.* at 847; *Sosa* expressly denounced several of those cases as "reflect[ing] a more assertive view of federal judicial discretion". 542 U.S. at 736 n.27.

[7] *Hilao*'s statement that the TVPA "codif[ied]" judicial decisions finding torture actionable under the law of nations does not address whether that codification supplanted the law of nations as to the TVPA's subject matter.

Kiobel asserts that "the TVPA had the very explicit purpose of extending the ATS to permit U.S. citizens to bring certain ATS claims in federal court". (KRB 38.) But the TVPA does not "extend" the ATS; instead, it is a statute permitting any individual — alien or citizen — to sue in the United States courts, provided that the plaintiff has met the various requirements set out in the Act, including the requirement of exhaustion. Under well-settled Supreme Court decisions dating back to Chief Justice Marshall, because the TVPA "speaks to" the subject, the courts may not resort to the law of nations for claims of torture or extrajudicial killing.[8]

IV. KIOBEL HAS NOT SATISFIED THE STATE ACTION REQUIREMENT.

Kiobel has not met the state action requirement for those claims requiring it (torture, extrajudicial killing, and cruel, inhuman and degrading treatment).

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[8] Kiobel contends that the TVPA's legislative history contains no "Congressional disapproval for an ATS claim based on CIDT". (KRB 41.) That is not so. "By creating a private right of action for victims of official torture, the TVPA 'executed' *in part* the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". *Flores*, 414 F.3d at 246 n.20 (emphasis added). The TVPA's legislative history shows that Congress reviewed the Convention and decided to prohibit only torture and extrajudicial killing, and rejected a cause of action for other cruel, inhuman or degrading acts. Congress can "explicitly[ ] or implicitly" "shut the door to the law of nations". *Sosa*, 542 U.S. at 731. Kiobel's argument would mean that Congress intended aliens to be able to sue aliens in United States courts for cruel, inhuman and degrading treatment occurring in foreign countries, but concluded that United States citizens should not be able to sue aliens in United States courts for those very same acts.

(*See* SB 26-28, 41.) The Shell Parties are not state actors. Kiobel argues that the state action requirement is unnecessary, KRB 31-32; satisfied because the Nigerian government actually perpetrated the alleged harms, relying on *Kadic* and *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005), KRB 30-31; or met because the Shell Parties acted under "color of law", KRB 32-37. Those arguments are unavailing.

A. State Action Is Required Because Kiobel Has Not Alleged Genocide or War Crimes.

Kiobel claims that plaintiffs "are not required to prove state action" based on *Kadic*. (KRB 31). *Kadic* does not support that proposition; rather, it eliminates the state action requirement for torture and summary execution only when "perpetrated in the course of genocide or war crimes"— neither of which is alleged here. (*See* SB 26-28.)

B. The Acts of the Nigerian Government Do Not Satisfy the State Action Requirement.

Citing *Kadic*, Kiobel also argues that "Plaintiffs are not required to prove that Shell itself was a state actor; the issue is whether state action is present in the violation". (KRB 30.) However, *Kadic* contains no such statement; the portion of *Kadic* Kiobel cites says that "the 'Bosnian-Serb entity' headed by Karadzic" might be a "state" for the purposes of the state action requirement, and that Karadzic might have acted under the aegis of the state of Yugoslavia. *Kadic*, 70 F.3d at 244. *Kadic* did not disassociate state action

from the defendant. The defendant, Karadzic, who was "President of the self-proclaimed Bosnian-Serb republic", "possess[ed] ultimate command authority over the Bosnian-Serb military forces" that committed "various atrocities . . . in the course of the Bosnian civil war", and was himself a state actor. *Id.* at 236-37, 245. *See also Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2001) (asking "whether [the defendant] was a state actor"). Kiobel's reliance on *Aldana* is likewise misplaced. In *Aldana*, a private security force allegedly tortured the plaintiffs; the question was whether the Mayor's alleged personal participation in the torture converted the private torture into state action, not whether a company's provision of funds or supplies to a state actor converted those private actions into state action. *Id.* at 1245, 1249-50.

C. Domestic "Color of Law" Jurisprudence Is Irrelevant to the Liability of the Shell Parties, and Would Not Support Their Liability Even if Relevant.

As discussed *supra* § I.A., *Sosa* requires that the question of "who" can be held liable for a violation of the law of nations must be determined by the law of nations. *Kadic* is of no assistance to Kiobel on this issue for two reasons. *First*, *Kadic*'s statement[9] on this

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[9] This statement from *Kadic* is not a holding, because *Kadic* first concluded that Karadzic, as the head of the unrecognized state of Spraska, was a state actor subject to international norms against torture. *See* 70 F.3d at 245. When a court rests its decision on two alternative grounds, neither has precedential value. *See Olin Corp. v. Ins. Co. of North America*, 221 F.3d 307, 317 (2d Cir. 2000).

issue is that Karadzic could be a state actor when he ordered human rights violations if he received assistance from the state of Yugoslavia in so doing—not the other way around. *See Kadic*, 70 F.3d at 245.

Second, *Kadic*'s statement that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for the purpose of jurisdiction under the Alien Tort Act", *id.*, does not survive *Sosa*. *See supra* § I.A.

None of the cases cited by Kiobel, KRB 32-36, suggests that international law has adopted Section 1983 jurisprudence. Although a few ATS cases reference Section 1983 jurisprudence post-*Sosa*, none of those considered *Sosa*'s impact on that practice.[10] *See, e.g.*, *Aldana*, 416 F.3d at 1247-48 (applying "color of law" jurisprudence, relying on *Kadic*); *see also In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1292 n.26 (S.D. Fla. 2006) ("[T]he Eleventh Circuit has not squarely addressed" whether "color of law" jurisprudence is a sufficiently well-developed norm of international law). Courts considering *Sosa*'s application to the state action requirement have found it inappropriate to import Section 1983 "color of law" jurisprudence. *See, e.g.*, *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006); *accord*, *Doe v.*

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[10] Besides *Aldana*, Kiobel cites only one post-*Sosa* ATS case as having applied "color of law" jurisprudence: *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005). *Mujica*, however, concerned "the 'color of law' requirement of the TVPA", not the existence of that doctrine as a settled norm of the law of nations. *Id.* at 1174-75.

Exxon Mobil Corp., 393 F. Supp. 2d 20, 25-26 (D.D.C. 2005).

D. The Shell Parties Did Not Act Under "Color of Law".

Even were Section 1983 "color of law" jurisprudence relevant, Kiobel has failed to plead facts demonstrating that the Shell Parties acted under "color of law". (*See* SB 27, 41.) There is nothing the Shell Parties are alleged to have done that would cloak them in state authority.[11]

Under Section 1983, "the party charged with the deprivation must be the person who may fairly be said to be the state actor". *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Kiobel admits that "the Nigerian government was the direct perpetrator" of the alleged violations. Kiobel does not allege that the Shell Parties controlled the Nigerian government or that Nigeria failed to exercise independent judgment, which would

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[11] The cases cited by Kiobel regarding aiding and abetting or conspiring with a state actor, KRB 33-34, are inapposite either because they involve situations in which the state actor and private actor acted together in directly perpetrating the plaintiffs' alleged harm, *see Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980); *Mujica*, 381 F. Supp. 2d at 1174-75; *Estate of Rodriquez v. Drummond*, 256 F. Supp. 2d 1250, 1264-50 (N.D. Ala. 2003), or because no state action requirement was necessary, *see Talisman*, 244 F. Supp. 2d at 327-28. And in *Spear v. Town of West Hartford*, this Court held that a meeting between attorneys for the town of West Hartford, Connecticut and attorneys for an abortion clinic did not demonstrate that the abortion clinic acted in concert with the town. 954 F.2d 63, 65, 68 (2d Cir. 1992).

be necessary to deem the Shell Parties state actors. *See Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272 (2d Cir. 1999); *Arnold v. I.B.M.*, 637 F.2d 1350, 1356-57 (9th Cir. 1981). Merely benefiting from the state actor's tortious conduct or engaging in a business venture with the state actor is insufficient. *See Ginsberg*, 189 F.3d at 273; *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1455 (10th Cir. 1995).

V. KIOBEL'S CRUEL, INHUMAN AND DEGRADING TREATMENT CLAIM SHOULD BE DISMISSED.

Kiobel rests the cruel, inhuman and degrading treatment claim on (1) noncontrolling federal caselaw; (2) the Restatement (Third) of the Foreign Relations Law; and (3) various international materials. (KRB 52-55.) Those sources do not evidence a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms". *Sosa*, 542 U.S. at 725.

Most of the federal court decisions relied upon by Kiobel predate *Sosa*. (KRB 53, 55.) The post-*Sosa* cases undercut Kiobel's position. For example, Kiobel relies on *Aldana* for the proposition that "crimes against humanity remain actionable claims under the ATS". (KRB 48.) *Aldana* holds just the opposite: "Based largely on our reading of *Sosa*, we agree with the district court's dismissal of Plaintiffs' non-torture claims under the Alien Tort Act. We see no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment". 416 F.3d at 1247. *Aldana* then overruled two district court cases relied on by Kiobel, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d

1322 (N.D. Ga. 2002) and *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1245 (S.D. Fla. 2001), noting that their reasoning was incompatible with *Sosa*. *Aldana*, 416 F.3d at 1247.

Another post-*Sosa* case relied on by Kiobel, *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), does not address whether claims for cruel, inhuman and degrading treatment are actionable after *Sosa*. *Abebe*, to the extent it would have supported a claim for cruel, inhuman and degrading treatment, does not survive *Sosa* and *Aldana*.

Perhaps the clearest illustration that Kiobel's position is at odds with *Sosa* lies in Kiobel's repeated citation to *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), for the propositions that "cruel, inhuman, or degrading treatment . . . [is] a separate ground for liability under the ATS" and that "allegations [that] do not rise to the level of torture . . . fall squarely within the core definition of CIDT". (KRB 53, 55.) The Supreme Court in *Sosa* expressly disapproved of *Xuncax* (and a number of similar cases) as "reflect[ing] a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today". 542 U.S. at 737 n.27 (referring to federal court decisions cited in the Brief for Respondent Alvarez-Machain 49, n.50, which includes *Xuncax*). *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004), also relied on by Kiobel, made the questionable judgment of affirming the *Xuncax* approach and finding it to be "entirely consistent with *Sosa*", although *Sosa* itself rejected *Xuncax*.

Kiobel fares no better in relying on the Restatement (Third) of Foreign Relations Law.

"[C]ourts must be vigilant and careful in adopting the statements of the Restatement (Third) as evidence of the customs, practices, or laws of the United States and/or evidence of customary international law". *United States v. Yousef*, 327 F.3d 56, 99-100 & n.31 (2d Cir. 2003). Moreover, even were the Restatement competent evidence, it extends liability to state actors only, not to private individuals or corporations. *See id.*, § 702(d) ("A *state* violates international law, as a matter of state policy, if it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment") (emphasis added).

Finally, the international materials cited by Kiobel, KRB 52-53 n.37, cannot establish that cruel, inhuman and degrading treatment has attained the status of customary international law. Those sources condemn cruel, inhuman and degrading treatment "without setting forth specific rules", making "it impossible for courts to discern or apply in any rigorous, systematic, or legal manner". *Flores*, 414 F.3d at 252. For example, the American Convention on Human Rights ("ACHR") states that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment", *id.*, art. 5(2), Nov. 22, 1969, 9 I.L.M. 673, but "utterly fails to specify what conduct would fall within or outside of the law", *Flores*, 414 F.3d at 255.

Moreover, in rejecting the ACHR as evidence of customary international law, this Court observed that "the United States has declined to ratify the [ACHR] for more than three decades". *Flores*, 414 F.3d at 258. Likewise, although the United States ratified The Convention Against Torture and Other Cruel,

Inhuman or Degrading Treatment ("CAT") and the International Covenant on Civil and Political Rights ("ICCPR"), they are not self-executing. *Accord Sosa*, 542 U.S. at 735 (the ICCPR was ratified "on the express understanding that it was not self-executing"); 136 Cong. Rec. S17486-01 (1990) (the CAT was ratified subject to Article 16—the provision condemning cruel, inhuman and degrading treatment—not being self-executing). Indeed, as explained *supra* § III, the TVPA represents Congress' decision not to execute the portions of the CAT concerning cruel, inhuman and degrading treatment. Thus, the ACHR, ICCPR and CAT have "little utility". *Sosa*, 542 U.S. 734-35. Additionally, the charters establishing the ICTY, ICTR and ICC, KRB 52-53 n.37, are not appropriate sources in the present context, for the same reasons set forth in our opening brief. (SB 24-26.)

VI. KIOBEL'S "CRIMES AGAINST HUMANITY" CLAIM SHOULD BE DISMISSED.

Kiobel claims that "Shell does not contest that crimes against humanity are prohibited when committed by private individuals". (KRB 31.) That is incorrect. Shell contests that "crimes against humanity" are actionable under the ATS *at all* post-*Sosa*, regardless of whether offenses are alleged to have been committed by private individuals *or* state actors, because "crimes against humanity" fails *Sosa*'s specificity test. (*See* SB 44-47.) Indeed, as Kiobel appears to define it, "crimes against humanity" is a catch-all that redundantly includes "massacre, torture, arbitrary arrest, and administration of extra-judicial punishments". (KRB 50.) Kiobel offers no evidence of a well-settled, universally accepted norm of customary international law that would prohibit those actions by

someone other than a state actor, particularly because each of the individual offenses does not violate the law of nations if committed by a private actor. *See Kadic*, 70 F.3d at 243.

Kiobel argues that there is a stable "core" customary law definition of "crimes against humanity", but does not say what specific, universally accepted elements constitute that alleged "core". (KRB 49, 51.) Kiobel argues that the varying definitions in the ICTY and ICTR statutes excluding such elements as "enforced disappearance of persons" and the "crime of apartheid" are not evidence of ambiguity in the ostensible norm, KRB 51 n.35, but the ability to add and subtract elements based on political circumstances does not suggest the existence of a norm sufficient to meet *Sosa*'s standard. By way of comparison, Kiobel could provide no evidence that the offenses of piracy, violation of safe conducts, and offenses against ambassadors were similarly malleable in the 18th Century. "Crimes against humanity" therefore cannot meet *Sosa*'s requirement of definite content.[12]

In response to our argument that the Restatement (Third) of Foreign Relations Law § 702 omits "crimes

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[12] *See* Diane F. Orentlicher, *Settling Accounts*, 100 Yale L.J. 2537, 2585-86 (1991) ("the meaning of [crimes against humanity] is shrouded in ambiguity. . . . [E]fforts to enlarge the scope of the crime have generated more controversy than consensus."); Payam Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide*, 94 Am. Soc'y Int'l L. Proc. 279, 280 (2000) ("[D]efining crimes against humanity is in practice difficult, and is highly dependent on particular factual contexts.")

against humanity", Kiobel asserts that "crimes against humanity" is omitted because "each of the predicate acts of crime[s] against humanity (such as torture or murder) are, as noted in § 702, independent violations of international law when committed by states". (KRB 48 n.32.) However, Kiobel's explanation is unavailing: if "crimes against humanity" adds something to the underlying predicate offenses, then the Restatement should list it as a standard in its own right. If "crimes against humanity" adds nothing, its exclusion from the Restatement is understandable, but then it is a purely generic catch-all term, and Count II of the Amended Complaint should be dismissed.

VII. KIOBEL'S "ARBITRARY ARREST AND DETENTION" CLAIM SHOULD BE DISMISSED.

In our opening brief, we raised three defects in Kiobel's claim for arbitrary arrest and detention: (1) Kiobel's international sources, defining "arbitrary arrest and detention", "had little utility under the standard set out" by *Sosa*, SB 48-49; (2) Kiobel did not meet *Sosa*'s observation that the Restatement requires both (i) a "state policy" of detention and (ii) a definition of "prolonged and arbitrary" detention; and (3) the district court made no attempt to examine any particular factual allegation of detention against a specific, universally accepted standard under international law.

Kiobel addresses the first point by citing the same sources rejected by *Sosa*: the UDHR and the ICCPR. 542 U.S. at 734-35. Kiobel's citation of additional declarations (the African Charter, the ACHR and the European Convention) does not surmount *Sosa's*

objection. Likewise, *Sosa* specifically rejected as incompetent evidence the U.S.-Iran hostages case from the International Court of Justice cited by Kiobel.[13] *See* 542 U.S. at 736 n.27 (rejecting *United States v. Iran*, 1980 I.C.J. 3, 42 (May 24)). *United States v. Iran* relies only on the UDHR, *see id.* at 42, and therefore adds nothing to Kiobel's argument.

Unable to demonstrate that "arbitrary arrest and detention" is of comparable specificity and acceptance as the three 18th-Century paradigm offenses, Kiobel argues: "The Court's holding in *Sosa* was limited to the detention claim in that case . . . 'a single illegal detention of less than a day . . . '". (KRB 56.) *Sosa*, however, cannot be so limited: it carefully sets out the framework for determining whether the ATS reaches challenged conduct, and rejects the precise sources.

Kiobel terms our second argument "frivolous", but cannot point to any state policy of arbitrary arrest or detention, and instead asserts "a policy of securing the oil fields". (KRB 57 n.40.) Kiobel's argument that haphazard arrests and detentions varying widely in condition and duration occurred as a result of an oil-field-protection policy does not establish a state policy of detention in violation of a settled norm of the law of nations. Kiobel also fails to produce any competent sources showing any norm imparting a universally understood meaning to "arbitrary" or "prolonged". Kiobel concludes by stating that "[d]etention is arbitrary if . . . 'it is incompatible with the principles of justice or with the dignity of the human person'". (KRB

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[13] The language quoted by Kiobel, KRB 56, comes from 1980 I.C.J. 3, as Kiobel's pincite makes clear, not 1979 I.C.J. 7.

57 n.40 (citing Restatement (Third) of Foreign Relations § 702, cmt. h).) However, the "practical consequences", *Sosa*, 542 U.S. at 732-33, of making a cause of action available for confinement that is "incompatible . . . with the dignity of the human person" would permit the federal courts to adjudicate prison conditions in foreign countries, and vice versa—a result at least as "breathtaking" as the definition rejected by *Sosa*.

Kiobel does not respond at all to our third argument. The district court failed to do what *Sosa* requires: the specifics of Kiobel's "detention claim must be gauged against the current state of international law . . . ". 542 U.S. at 734.

CONCLUSION

For the foregoing reasons, Kiobel's complaint should be dismissed.

Dated: July 24, 2007

Respectfully submitted,

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by

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January 23, 2009

VIA COURIER

Hon. Chief Judge Dennis Jacobs
Hon. Judge Pierre N. Leval
Hon. Judge José A. Cabranes
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

RE: Presbyterian Church of Sudan *et al.* v. Talisman Energy Inc., *et al.*
Docket No. 07-0016-cv

Dear Hon. Judges Jacobs, Leval and Cabranes:

This letter brief responds to the Court's questions concerning corporate liability under the Alien Tort Statute ("ATS").

Talisman's counsel, in response to a question from the Court, stated that it would be "shocking" that a corporation involved in slave trading would be immune from liability under international law. Counsel was certainly right that such a result would be "shocking;" fortunately, he was wrong that international law would recognize such an immunity today. As John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, noted in his 2007 report to the Human Rights Council and the General Assembly: "the most consequential legal development" in the "business and human rights constellation" is "the gradual extension of liability to companies for international crimes, under domestic jurisdiction but referring to international standards." The Special Representative concluded that "[t]he number of domestic jurisdictions in which charges for international crimes can be brought against corporations is increasing, and companies may also incur non-criminal liability for complicity in human rights abuses."[1]

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[1] Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises — *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/4/035 (Feb. 9, 2007) at 74, 85; *See also Corporate Complicity and Legal Accountability, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, International Commission of Jurists (2008) available at* http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity.

There is simply no support for Appellee's proposition that Congress violated any principle of international law by enacting the ATS without an immunity for corporations or that any international law immunity exists for corporate violations of international human rights such as genocide, crimes against humanity or war crimes. Significantly, even the U. S. Government's amicus brief in this appeal does not support the Appellee's position. There is no relevant distinction in any theory of tort or criminal law that immunizes one class of private actors with respect to ordinary wrongs, and it would be particularly nonsensical to apply such a theory to the narrow class of heinous wrongs that are the concern of customary international law. This is likely why the Supreme Court explicitly included corporations within the class of private actors subject to potential ATS liability. *Sosa v Alvarez-Machain, 542 U.S. 692, 733 n. 20 (2004).*

Plaintiffs have presented proof that Talisman actively participated in the most serious human rights crimes recognized in international law. The plaintiffs assert that as part of a joint plan which Talisman approved, Talisman and its joint venture partners agreed to the creation of a military *cordon sanitaire* surrounding their oil operations and then proceeded to re-fuel Antonov bombers, that they knew or should have known were flying missions to bomb unarmed civilian villages, and helicopter gunships that they knew were attacking unarmed civilian villages in and around the concession area to create the military cordon necessary for oil exploration work to go forward.

J.A. 012941[2] The consortium's Heglig and Unity fields were routinely used by the Sudanese military with the consortium's consent to re-fuel and re-arm the Antonov bombers and helicopter gunships based there. J.A. 003132, J.A. 015095 at 89:20-90:11 and 91:13-92:2; J.A. 015935 at 151:18-23. Arming and re-fueling military aircraft engaged in attacking defenseless civilian targets cannot be fairly characterized as ordinary commercial activity. Such claims are at the core of these human rights crimes.

There are many good reasons why no court has granted the blanket immunity Appellee Talisman seeks in making this argument. There appears to be no jurisdiction in the world in which corporations, by virtue of their status as juristic entities, are immune from civil liability in tort, nor is there any accepted international law immunity that prevents any

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[2] A senior Talisman executive in Sudan wrote to the Sudan Steering Committee in Calgary concerning a draft letter regarding the ongoing bombing of civilians by the Government of Sudan ("GOS"): "Reg prepared a letter condemning the bombing and I thought this letter would hurt rather than foster our relations with the GOS (which is part of our performance contract.) They will continue bombing anyway and we would look foolish telling them to stop bombing (they don't have the facility to do accurate bombing.)" J.A. 015935 (Heglig Field was used as a base for round the clock bombing runs); J.A. 015095 at 89:20-90, 91:13-92:2 (Talisman secondee to GNPOC testified that military aircraft were routinely re-fueled by consortium personnel at Heglig); J.A. 012765-68 (Talisman CEO James Buckee was personally informed by the head of GNPOC security that the military preferred to use Unity Field as a base for its helicopter gunships, and would not move to Rubkona, due to the unlimited supply of free, clean fuel at Unity, provided by the consortium.)

jurisdiction from prosecuting a corporation for the actions alleged and proved by plaintiffs in this action.

For at least sixty years, the international community has recognized that corporations are capable of violating international law. In applying the London Charter in the area under its control, the United States Military Tribunal found that I.G. Farben corporation had violated international law stating: "[W]e find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied territories." Case No. 57, *The I.G. Farben Trial*, U.S. Military Tribunal, Nuremberg, August 14, 1947-June 29, 1948, 10 Law Reports of the Trial of War Criminals 1; 8 Trials of War Criminals Before the Nuremberg Military Tribunal 1108, 1140, Int'l Law Rep. 676 (1948).[3]

As this Court has noted, the Nuremberg criminal trials addressed the liability of industrialists but not corporate entities themselves. However, the example of I.G. Farben, which was raised at oral argument is an interesting one, as subsequent to the Nuremberg judgment, Norbert Wollheim, an individual subjected to slave labor by Farben, successfully brought a civil

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[3] *See also, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I(2), U.N. Doc. A/2645 (1953), (applicable to "organizations, institutions and individuals"); Universal Declaration of Human Rights, Preamble, U.N. Doc. A1810 (1948), (applicable to "every individual and every organ of society.")

suit in Germany against I.G. Farben as a corporate entity. *Wollheim v. I.G. Farben*, HHStAW, Abt. 460, No. 1424, Vol. III, pp. 425 — 445, court file no. 2/3/0406/51 (June 10, 1953). The Frankfurt court, decided the case on the basis of German civil law and found that I.G. Farben was liable for damages.[4] This suit was followed by many other claims for civil reparations from I.G. Farben handled by Nuremberg prosecutor Benjamin Ferencz.[5] There is no evidence that any State believed that corporations were entitled to any immunity from criminal or civil liability under international law for any of the crimes within the London Charter.

Of course, numerous civil lawsuits were filed against an array of corporate defendants in U.S. federal courts in the Holocaust cases. *See generally*, MICHAEL BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003) describing the entire body of litigation. It should be emphasized that the United States Government at the highest levels supported these civil claims against German, Austrian and Swiss corporations in U.S.

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[4] "The fundamental principles of equality, justice and humanity must have been known to all civilized persons, and the I.G. corporation cannot evade its responsibility any more than can an individual." *Wollheim v. I.G. Farben*, HHStAW, Abt. 460, No. 1424, Vol. III, pp. 425–445, court file no. 2/3/0406/51 (June 10, 1953). For a discussion of the case, see BENJAMIN FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION 36 (1979).

[5] These civil actions are described in Diarmuid Jeffreys, *Hell's Cartel: IG Farben and the Making of Hitler's War Machine*, 405-07 (2008).

courts and assisted the plaintiffs in obtaining multi-billion settlements against these corporations. STUART E. EISENSTADT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II, (2003) Thus, the United States government was of the view that imposing liability under the ATS and other grounds against foreign corporations for events occurring entirely outside the United States during World War Two was not only permissible under international law but indeed was desirable and in the interests of the United States. The Supreme Court decided *Sosa* with the example of the Holocaust Litigation squarely before it. *See*, Brief of Amicus Curiae, World Jewish Congress, *available at* http://www.sdshh.com/Alvarez/WorldJewishCongress.pdf. Although *Sosa*, involved an individual defendant, the Supreme Court clearly indicated in its opinion that it accepted corporate liability under the ATS in cases in which liability extends to private actors.

Significantly, despite its opposition to nearly every other aspect of ATS litigation against corporations,[6]

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[6] The Bush Administration filed amicus briefs or Statements of Interest and/or amicus briefs in several ATS cases against corporations without making this argument: *See, e.g., National Coalition Government of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 362 (C.D. Cal. 1997) (discussing US Statement of Interest); Brief for the United States as *Amicus Curiae*, *Doe v. Unocal Corp.*, Nos. 00-56603, 0056628 (9th Cir. May 8, 2003) (available at http://www.cja.org/legalResources/ StateDepartment Briefs/UnocalDOJBrief.pdf); Statement of Interest of the United States, *Sarei v Rio Tinto*, No. CV 00-11695 (C.D. Cal. Nov. 5, 2001) (available at http://www.cja.org/legalResources/StateDepartmentBriefs/RioTintoStmnt.pdf); Statement of Interest of

the State and Justice Departments under the Bush Administration have never aligned themselves with the extreme view that corporations cannot be sued under the ATS as a matter of international law or as a matter of statutory construction. In *Vietnam Association of Victims of Agent Orange v. Dow Chemical, et. al.*, 517 F.3d 104, 124 (2d Cir. 2008), the United States Department of Justice submitted a Statement of Interest arguing that the federal common law government contractor defense should preclude plaintiffs' claims, but the government did not assert that Dow Chemical or the other corporate defendants were immune from claims because they were corporations. 517 F.3d 104, 124 (2d Cir. 2008) (No. 04-cv-400)

There is nothing in the language or history of the ATS that would exempt corporations from tort liability under the statute. To the contrary, the ATS has been interpreted by the Attorney General of the United States to provide for a remedy against corporations for more than one hundred years.[7] There is no principle of international law that would exempt corporations from tort liability in U.S. courts for complicity in genocide, crimes against humanity or war crimes. Courts before

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the United States, *Doe v. ExxonMobil*, No. 01-CV-1357 (D.D.C. July 29, 2002) (available at http://www.cja.org/legalResources/State DepartmentBriefs/ DOSexxon.pdf).

[7] 26 OP. ATTY GEN. 250 (1907) (Attorney General Charles J. Bonaparte concluding that the American Rio Grande Land and Irrigation Company could be sued in the United States under the ATS for wrongfully and knowingly cause a change in the current channel in the Rio Grande river in violation of a treaty between the United States and Mexico.)

and after *Sosa*, have uniformly found corporations subject to suit under the ATS. Judge Schwartz's careful analysis of these precedents in this action led him to reject Talisman's argument here, *Presbyterian Church of Sudan, et al., v. Talisman Energy, Inc., et al.*, 244 F.Supp. 2d 289 311-319 (S.D.N.Y. 2003), and all of the cases since Sosa have found corporations subject to suit under the ATS.[8] The drafters of the ATS were not limited by any principle of international law, before or since 1789, that prevented them from making a forum available for this category of international torts in order to effectuate their desire to enforce law of nations violations effectively in U.S. courts.

Under basic principles of international law, States may assert criminal jurisdiction or civil jurisdiction over tort claims unless there is a countervailing principle of international law restricting the exercise of such jurisdiction.[9] There is no international law

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[8] *Khulumani et al. v. Barclay National Bank, Ltd., et al*, 504 F3d 254 (2d Cir. 2007); *Sarei v. Rio Tinto, PLC*, 2008 WL 5220286 (9th Cir. 2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Romero v. Drummond Co., Inc.*, ___F.3d___, 2008 WL 5274192 (11th Cir. 2008); *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257, 293 (E.D.N.Y. 2007); *John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988 (S.D.Ind. 2007); *Doe v. Exxon Mobil Corp.*, 573 F.Supp.2d 16 (D.D.C. 2008); *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164 (C.D.Cal. 2005); *Hereros v. Deutsche Afrika-Linien GMBLT & Co.*, 2006 WL 182078 (D.N.J. 2006).

[9] In the *S.S. Lotus* case, France argued that Turkey was barred from instituting criminal proceedings against a French officer because few, if any other States had done so in similar circumstances. The Permanent Court of International Justice, the precursor to the International Court of Justice rejected that

principle that is even remotely applicable to the exercise of jurisdiction over the international tort claims asserted by plaintiffs in this case.[10] Indeed, it is

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argument: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove the circumstance alleged by the French government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that states have been conscious of having such a duty..." *S.S. Lotus (France v Turkey)*, PCIJ Rep., Ser. A, No 10, at 4 (1927).

[10] The principle of universal jurisdiction, discussed by Talisman in the oral argument, is a principle relating to the exercise of criminal jurisdiction. These limitations do no apply in the context of the exercise of civil jurisdiction. In any event, there is no doubt about the existence of universal criminal jurisdiction with respect to the crimes of genocide, crimes against humanity and war crimes of the kind alleged in this action. *See, Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2005) (Breyer, J., concurring) (universal jurisdiction exists to prosecute a "subset" of universally condemned behavior including torture, genocide, crimes against humanity, and war crimes) (citing International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses 5-8 (2000), *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, (Trial Chamber, 1998) ¶¶ 155-156; *Attorney Gen. of Israel v. Eichmann*, 36 I.L.R. 277 (Sup.Ct. Israel 1962)); *see also U.S. v. Yousef*, 327 F.3d 56, 104-105 (2d Cir. 2003) ("In modern times, the class of crimes over which States can exercise universal jurisdiction has been extended to include war crimes and acts identified after the Second World War as "crimes against humanity.") (citing *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir.1985), vacated on other grounds, 10 F.3d 338 (6th Cir.1993)). *Arrest Warrant of April 11th 2000* (Democratic Republic of the Congo v. Belgium), ICJ Judgment, Merits, 41 ILM 536 (2002) (sep. op. Judges Higgins, Koojimans, Buergenthal at §§ 61-

a basic principle of international law that the manner in which international law is enforced by States is left to their own domestic laws. This was the principle discussed in detail in Judge Edwards' opinion[11] in *Tel-Oren v Libyan Arab Republic*, 233 U.S. App. D.C. 384 (D.C. Cir. 1984), to which the Supreme Court aligned itself in the Sosa case. 542 U.S. at *731. *See also Kadic v Karadzic*, 70 F. 3d 232, 246 (2d Cir. 1995)(The law of nations . . . leaves to each nation the task of defining the remedies that are available for international law violations.")

Requiring plaintiffs to prove that international law subjects a particular category of defendant to civil liability would be no different than adopting the discredited claim that international law must supply

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65 (piracy, war crimes, and crimes against humanity are subject to universal jurisdiction); sep. op Koroma at § 9 (piracy, war crimes, and crimes against humanity, including the slave trade and genocide are subject to universal jurisdiction); diss. op. Van Den Wyngaert at § 59 (war crimes and crimes against humanity, including genocide are subject to universal jurisdiction)).

[11] "The law of nations thus permits countries to meet their international duties as they will." L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, INTERNATIONAL LAW 116 (1980);cf. 1 C. HYDE, INTERNATIONAL LAW 729 n.5 (2d rev.ed. 1945). In some cases, states have undertaken to carry out their obligations in agreed-upon ways, as in the United Nations Genocide Convention, which commits states to make genocide a crime, Henkin et al., supra, or in bilateral or multilateral treaties. Otherwise, states may make available their municipal laws in the manner they consider appropriate. SEE RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 3 cmt h & ill 5 (1965)(domestic law of state may provide a remedy to a person injured by a violation of a rule of international law)." *Tel-Oren v Libyan Arab Republic*, 233 U.S. App. D.C. 384 at 778 (D.C. Cir. 1984).

the cause of action in an ATS case. By citing the Edwards opinion in *Tel-Oren*, and not the Bork opinion, the Supreme Court has made it clear that it would be inappropriate to expect international law to define all aspects of an ATS claim. Thus, the decision whether or not to hold corporations or any other non-natural person liable for the international torts the ATS was designed to enforce is a matter for the United States to decide, not an issue governed by international law.

Talisman's reliance on the Rome Statute as a recent example of an international agreement that does not impose liability on corporations does not support the view that international law provides corporations with immunity from prosecution. The Rome Statute, like the Charter of the International Military Tribunal at Nuremberg, allows for the prosecution of corporate executives for actions taken by their business enterprises. The decision not to include corporations as defendants in the Rome Statute was a compromise based on factors related to time constraints in negotiations and the mandate of that particular court. Moreover, the drafters of the Rome Statute explicitly rejected the notion that its provisions embodied the current state of customary international law. Rome Statute, Article 10 provides: "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute of the International Criminal Court: UN Doc. A/CONF. 183/9; 2187 UNTS 90, 37 ILM 988 (1998). In other words, the Rome Statute is *sui generis* and reflects a highly specialized, carefully negotiated, and intentionally circumscribed body of principles, which

cannot and do not alter the general practice of states and *opinio juris* as catalogued and applied by the *ad hoc* criminal tribunals and summarized in appellants' briefs. Certainly no argument was raised that international law prevented the conferees from imposing corporate criminal liability in that or any other context. See *generally*, Andrew W. Clapham, "The Question of Jurisdiction Under Criminal Law Over Legal Persons: Lessons From The Rome Conference on the International Criminal Court," in Liability of Multinational Corporations Under International Law, Menno T. Kamminga and Saman Zia Zarifi, eds) (2000).

U.S. corporations may be subject to criminal penalties under U.S. law for committing or aiding and abetting torture, genocide and war crimes committed outside the territory of the United States. 18 U.S.C. §§ 2, 1091, 2340A 2441. It would be ironic if U.S. corporations could be charged with criminal offenses for the kind of conduct involved in this action while the ATS was found not to apply to corporations. These U.S. statutes like the ATS, represent a decision about how to implement international human rights norms within our domestic jurisdiction.

A host of international treaties impose obligations on legal persons, including corporations, in some cases directly, and in other cases by requiring the State parties to implement domestic legislation to hold corporations and other legal persons accountable.[12]

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[12] International Convention on the Suppression of Financing of Terrorism, art. 5, G.A. Res. 54/109, 9 Dec. 1999, 39 I.L.M. 268 (2000), (entered into force 10 Apr. 2002); International Convention

Additionally, there are many contexts in which corporations have been specifically included as the subjects of international treaties or enforcement proceedings, including treaties relating to international human rights norms. Corporations often seek legal protection for their interests in international law and are often granted rights under international customary and treaty law.[13] There is no international

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on Civil Liability for Oil Pollution Damage, art. 3(1), 26 U.S.T. 765, 973 U.N.T.S. 3 (Nov. 29, 1969); Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982, arts. 1, 3(a), 956 U.N.T.S. 251 (July 29, 1960); Vienna Convention on Civil Liability for Nuclear Damage, art. 2(1) 1063 U.N.T.S. 265 (May 21, 1963); Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, arts. 1, 2(2), 974 U.N.T.S. 255 (Dec. 17, 1971); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, arts. 2(14), 4(7), 1673 U.N.T.S. 125. (March 22, 1989); United Nations Convention Against Transnational Organized Crime, art. 10, S. Treaty Doc. No. 108-16 (2004), reprinted in 2004-1 C.T.I.A. 949, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), arts. 16(2), 25, 66, U.N. Doc. A/RES/45/158 (July 1, 2003); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 U.N.T.S. 243 (entered into force 18 July 1976). ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and To Bargain Collectively, art. I(1), 96 U.N.T.S. 257 (1951) (entered into force July 18, 1951); UN Convention against Corruption, art. 12 G.A. Res 4, U.N. GAOR, 58th Sess., Agenda Item 108, U.N. Doc. A/RES/58/4 (entered into force 14 Dec. 2005).

[13] *See, e.g.*, North American Free Trade Agreement, arts. 1102, 1106, 1109, 1110, U.S.-Can.-Mex., 32 I.L.M. 289-397, 605-779 (entered into force Jan. 1, 1994); United States Trade

law principle that enables corporations to derive benefits from international law while receiving an immunity from prosecution or even civil liability for violating the most fundamental human rights norms — and particularly not for norms the international community views as *jus cogens*.

Appellants' survey since January 12, 2009 suggests that nearly every State's domestic tort laws provide for civil liability against corporations for the kinds of egregious acts at issue in this case. It is not clear whether there are many other jurisdictions that have imposed liability for international torts in the manner the ATS. However, it appears that general principles of law common to all legal systems support the imposition of civil liability of some kind when

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Representative, U.S. Model Bilateral Investment Treaty (BIT), arts. 3-6, 24 (2004), *available at* http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Sectionin_Index.html (generally representative of rights afforded to investors and their investments under the network of approximately 40 BITs into which the United States has entered with other countries and which remain in force). *See* http://tec.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp for a list and the text of these treaties); Paris Convention for the Protection of Industrial Property, Mar. 20,1883, 21 U.S.T. 1538, 828 U.N.T.S. 305 (last revised July 14, 1967); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised July 24, 1971); Trademark Law Treaty, Oct. 27, 1994, 2037 U.N.T.S. 35, 34 Indus. Prop. L. & Treaties 3-010, 001 (Jan. 1995); General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, 33 I.L.M. 81 (1994); WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, WIPO Publ. No. 226(E); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76, WIPO Publ. No. 227(E).

companies commit torts of any variety.[14] There is little doubt that the plaintiffs could sue Talisman for these transitory torts in the United States if they were seeking relief for wrongful death, assault and battery and similar common law torts without the slightest concern about international law restrictions on the exercise of such jurisdiction. The fact that Congress required that plaintiffs make a threshold showing of the type of manifest violation of the law of nations suffered by the plaintiffs before these claims could be heard in the federal courts, does not change the international law analysis.

Members of this Court asked whether a corporation involved in slave trading, sex trafficking, running torture centers or engaged in the systematic destruction of civilians and civilian villages could be sued under the ATS. Talisman asks this Court to grant immunity to corporations for such acts, as "shocking" as that would be, because international criminal tribunals have not imposed criminal liability against corporations to date. This does not mean that there is any international immunity for corporations from such criminal liability, nor does this mean that States may not impose such liability in their domestic criminal or civil laws.

No court has ever found that corporations are exempt from liability under the ATS. There is nothing in the language or the history of the statute that

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[14] *See, e.g.* Beth van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. J. INT'L. L. 141 (2001).

supports such a result. Indeed, there is no policy justification for such an absurd result, nor has Congress ever been asked to circumscribe ATS liability in this way despite over a decade of litigation concerning corporate complicity under the Act. The United States government has never supported the view that corporations enjoy immunity under international law. There is simply no support for such a proposition.

This Court should join the long list of other courts, including the District Court below, that have allowed ATS claims against corporations to proceed, just as this Court and others have found that other non-state actors are subject to ATS liability.

Respectfully submitted,

/s/ Carey R. D'Avino

cc: All Counsel of Record